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Supreme Court, U.S.
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No. 08-

IN THE

Supreme Court of the United States

LINCOLN NORTH DEVELOPMENT CORPORATION,

Petitioner,

v.

TOWN OF KEARNY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This is an appeal that arises from the New Jersey state court system. It has involved efforts of Lincoln North Development Corporation ("Lincoln North"), a trade association of South Kearny, New Jersey, business owners, in challenging the constitutionality of Ordinance 64, a draconian anti-trucking ordinance that will flatten the tires of interstate commerce in the Tri-State area. The Town of Kearny promulgated Ordinance 64 with the intention of ringing the ultimate death knell for a critical Mecca of interstate commerce, which is located in a strategic chokepoint of the Tri-State trucking and transportation industry. Over 1,500,000 trucks arrive and depart annually from South Kearny, shipping their goods across our nation from coast-to-coast. If this Petition is not heard, the lights of these trucks, which serve our nation daily, will go out and a new and darker commercial era will commence.

Three questions are presented:

(1) This case presents a critical issue of first impression; *i.e.*, whether a municipal ordinance which seeks to increase property tax revenues, but will have the effect of suffocating and ultimately destroying a vital center of interstate commerce and crippling the trucking industry in the Tri-State area, violates the Dormant Commerce Clause.

(2) Did the New Jersey courts err in upholding the summary judgment dismissal of Petitioner's argument that the operation of the expansive trucking support facilities surrounding the massive CSX railhead cannot be interfered with under the preemptive authority of the Interstate Commerce Commission Termination Act ("ICCTA")?

(3) Can a municipality enact an ordinance which, on its face, renders unlawful the trucking operations of a Regional Federal Postal Distribution Center, by placing it in the no-trucking zone, in conflict with federal criminal statutes and case law dating back to the Founding of the Republic?

CORPORATE DISCLOSURE STATEMENT

The Town of Kearny is a municipal corporation of the State of New Jersey.

Lincoln North Development Corporation is a New Jersey non-profit corporation, which was formed as a trade association of South Kearny, New Jersey, businesses in 1987.

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OPINION BELOW

On May 15, 2008, the Supreme Court of New Jersey denied Lincoln North's Petition for Certification without opinion. *See* Appendix D. The New Jersey Superior Court, Appellate Division, A-1960-06T5, filed a not-for-publication per curiam opinion, affirming without independent analysis orders of the New Jersey Superior Court Law Division. *See* Appendix A. Said Law Division opinions and orders were issued on May 4, 2006, rendering partial summary judgment, and October 27, 2006, disposing of the remaining issues after a trial on the merits. *See* Appendices B-C.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1257. Lincoln North seeks this Court's review of the March 19, 2008 Opinion and Order of the New Jersey Superior Court, Appellate Division, and the New Jersey Supreme Court's May 15, 2008 denial of Certification.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article I, § 8, cl. 3: "The Congress shall have the power. . . . To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."

United States Constitution, § 8, cl. 7: "The Congress shall have the power. . . . To establish Post Offices and Post Roads."

United States Constitution, Article VI, cl. 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding."

Town of Kearny, County of Hudson, 2004-(O)-64.

The Interstate Commerce Commission Termination Act, 49 U.S.C. § 10101, *et seq.*

18 U.S.C. § 1702, § 1703(a) (criminal penalties for interference with federal mails).

STATEMENT OF THE CASE

For over fifty (50) years, trucking and trucking-related uses have been the dominant land use in South Kearny, New Jersey. This has been a boon to interstate commerce, as tens of millions of trucks have come to load and unload in South Kearny. But the Town of Kearny believed that more taxes could be collected if these truck terminals, which they considered to be an eyesore, were to be simultaneously phased out and shut down, effective immediately. Thus, the governmental decision was made that trucking operations should be walled in and covered with concrete, even though the Town's representatives knew, or certainly should have known, that an indoor trucking business and industry is an oxymoronic construct.

The stakes of this Petition are high. It will determine whether a critical artery of interstate commerce will be destroyed. It will decide if municipalities may legally empower their agents to harass and to sanction federal postal officials with impunity. It will determine if the preemptive scope of the Interstate Commerce Commission Transportation Act can be ignored. It will determine if the trucking industry can have a "home" anywhere in New Jersey or anywhere else in the Northeast.

Historically, South Kearny has been a thriving trucking/heavy industrial community. Eighty percent of South Kearny businesses engage in and support the trucking industry. Before the enactment of Ordinance 64, the Town of Kearny allowed truck terminals, motor freight terminals, railroad terminals and yards, cartage and express facilities as a matter of right throughout all of South Kearny (the "SKM" Zone). Ordinance 64 created two zones within the former SKM zone, designated as SKI-N and SKI-S (which together encompassed all of South Kearny). Per Ordinance 64, truck terminals are now a non-conforming use in the SKI-S zone.

There are no residential areas in South Kearny and no residential areas adjacent to it. South Kearny has excellent access to the major area highways, including the New Jersey Turnpike, U.S. Routes 1 and 9, Interstate Route 78 and Interstate Route 280. The truck route of Routes 1 and 9 bisect South Kearny almost in the middle of the South Kearny peninsula.

The Town of Kearny adopted Ordinance 64 in November, 2004. The purported basis for Ordinance 64 was the Reexamination Report, which served as the vehicle for the 1991 Master Plan revision.

The 1991 Master Plan described the principal uses in the South Kearny area as consisting of "general warehousing, chemical storage/warehousing, heavy industrial uses and trucking terminals." It stated that these uses are "poor tax ratable and employment sources," and were an eyesore. No studies were cited to support the conclusion that these uses were "poor tax ratable and employment sources."

The 1991 Master Plan further stated that truck terminals involving trailer truck parking and storage with minimal on-site improvements occupy 475 acres of land or 52% of the total South Kearny land area, and recognized trucking as the dominant land use in South Kearny.

Per the 1991 Master Plan, over 75% of the South Kearny properties used for truck terminals are located north of Lincoln Highway. It further states that the "geographical distribution of these uses is key to any consideration for adjustment of both the Land Use Plan and implementing the Zoning Ordinance for the South Kearny area."

The 1991 Master Plan considered the area south of the Pulaski Skyway to north of Lincoln Highway to be a separate study area. It determined that "trucking terminals dominate this central portion of the South Kearny study area." It recommended that "trucking terminals be continued to be permitted as a matter of right within this area which will also be designated SKM-1."

The 1991 Master Plan recommended that South Kearny be rezoned into two "distinct districts; SKM-1 and SKM-2." The purpose of the two zones was to "permit specific uses and create transitional areas and uses between the railroad yards, truck terminals, and the PSE&G power plant on the north and the far southern tip of South Kearny where River Terminal Development and other internal storage, warehousing, and industrial facilities are located." The 1991 Master Plan states that truck terminals will be permitted as a "matter of right" in the SKM-1 zone. Other uses will be encouraged via changes to height, coverage and density criteria. Truck terminals will be permitted to expand and modify subject only to site plan approval where compliance with updated use and site design requirements will have to be satisfied.

In 2002, Kearny retained Heyer, Gruel & Associates, P.A. to prepare a Master Plan Reexamination Report. On May 7, 2003, the Town Council adopted this measure. This Report recommended numerous changes to the 1991 Master Plan and to the zoning ordinances applicable to South Kearny, including the creation of a new dividing line between certain uses in South Kearny. This new zoning boundary designated additional truck-related properties in the no-trucking zone.

Consistent with the Reexamination Report, Ordinance 64 divides the former South Kearny Manufacturing Zone into the SKI-N and SKI-S Zones. Under Ordinance 64, permissible uses in the SKI-N Zone include, but are not limited to, the following: motor freight facilities, freight forwarding facilities, intermodal facilities, truck terminals, warehouse and distribution facilities and railroad terminals and yards.

In contrast, the SKI-S "no trucking" Zone may include any use permitted in SKI-N *except* many of the truck, railroad and container-related uses that are permitted within the SKI-N Zone, including motor freight facilities, freight forwarding facilities, intermodal facilities and trailers. Ordinance 64 also amended many of the use, bulk, yard, buffer and area requirements/ restrictions within both the SKI-N and SKI-S Zones, despite the fact that the Reexamination Report fails to provide any support or justification for this.

Section 36-9.2(c) of the Town of Kearny Land Use Code grants broad discretion to construction officials to determine whether the requirements of Ordinance 64 should be extended to apply to Northern Zone properties. Construction officials have the discretion to refer an application for a building permit or for site plan approval. Thus, merely requiring a building permit would trigger compliance with Ordinance 64 for Northern Zone properties.

Per Ordinance 64, Northern Zone businesses that utilize, *inter alia*, "outdoor storage of containers, off street parking and loading," and are later required, through business necessity, to change the use of their property in a way which would invoke the provisions of Ordinance 64 (to include a request for a building permit), now must face a terrible, Hobson's choice. They will either be forced to avoid, if possible, making necessary improvements to their properties, or they will be required to establish "a 25 foot-wide strip of landscaped open space, with heavy vegetative screening along its borders." 38:6-6[A](i).

If a property in the Northern Zone intends to utilize container storage, the Ordinance provides that this "minimum 25 foot landscaped buffer . . . shall contain a combination of deciduous and evergreen trees and shrubs and berming necessary to visually screen the proposed use." 38:6-6[F](2). These elaborate and confiscatory landscaping requirements find no support either in 1991 Master Plan or in the Reexamination Report, especially since the Board, Town and Planner have recognized the extremely dense use of property in South Kearny.

The Reexamination Report says nothing about the need for a 25-foot wide "buffer." By way of an example and hypothetical, this means that if you have a 125 foot wide property in the Northern section for storing containers or used for parking or loading, the property owner would be left with 75 feet of usable property to work on, a reduction of 40% of productive use!

Trial testimony demonstrated how difficult it would be for trucking operations to function properly within such a restricted area. By their very nature, trucks require a considerable amount of room to maneuver. Mr. Frank E. Kearney, President of Lincoln North and a long-time area property owner, provided uncontroverted testimony that the buffer requirement would render some of these properties "useless."

The implications of these zoning restrictions are disturbing. Every year, over 1,500,000 trucks enter and leave South Kearny. Petitioner's expert, Arthur Max, attested in the record, without contradiction, to the unique and critical nature of the South Kearny trucking industry as an engine of interstate commerce.

The record supports an even broader conclusion. Indeed, South Kearny is not only a hub of interstate commerce, but international trade, through its Foreign Trade Zones. 19 U.S.C. § 81(a) *et seq.*; 15 C.F.R. Part 400; N.J. Stat. Ann. § 12:13-1, *et seq.*

South Kearny's integrated commercial engine relies upon the planned, concerted and synergistic action of trucking, railroads and shipping. One of these commercial components cannot be impaired without damaging the functioning and efficiency of the others. The Reexamination Report anticipates the construction and expansion of a Portway Project, which will result in a twofold increase in port traffic by 2010, and a tenfold increase by 2040. This Report states that South Kearny must be in a position to capitalize upon the growth opportunities that this project will provide. Ordinance 64, in turn, crushes the dynamism of the trucking industry and renders South Kearny businesses ill-equipped to adapt and expand to accommodate market conditions.

The Town of Kearny's destructive rapacity, embodied in Ordinance 64, was not confined to its direct attack upon the trucking industry, with its combination of outright proscription in the Southern Zone and its straight-jacket and hair-trigger nullification of the weak grandfather clause applicable to the Northern Zone. It sought also to quickly and systematically starve the trucking industry and the businesses that rely upon it of critical support facilities that they must have to properly load and unload their cargoes from railroads and other locations. These are the same railroad facilities that the ICCTA keeps out of the reach of state power,

under the broad, protective umbrella of federal law. Ordinance 64 marks an attempt to thrust this vital federal interest aside, which will ultimately result in an endless backup and logjam of trains, idling indefinitely, all the while laden with vast stores of now immovable cargo.

If Ordinance 64 is to be read with a literal eye, private trucking will become an endangered and extinct species and the functioning of the railroads be severely impaired. It will also be open season on protected federal targets as well. The federal postal distribution facilities in South Kearny, also located within Ordinance 64's expansive breath, are purportedly subject to this Ordinance's proscriptive anti-trucking mandates.

The Post Office cannot move our mail without trucks to do it. The practical application of Ordinance 64 to the Post Office would both be unconstitutional and a federal crime. The Ordinance neither acknowledges nor carves out any exception that would preclude its application to federal mail, which now must be transported by trucks that are now "outlawed" in the lawless urban wilderness of the Town of Kearny. Such a measure, although comical in its incompetence, nevertheless represents a breathtaking arrogation of federal authority.

Lincoln North challenged the imposition of these industry-killing restrictions by filing an action in lieu of prerogative writ in the New Jersey Superior Court, Law Division, Hudson County, on December 28, 2004. The Commerce Clause issue was raised in the Third Count of Lincoln North's Complaint. This

issue was raised again on appeal and addressed on Pages 38-44 of Lincoln North's March 9, 2007 appeal brief. The Commerce Clause issue was also raised and briefed on the merits on Pages 3—11 of Lincoln North's April 4, 2008 Petition for Certification.

The issue of preemption under the Interstate Commerce Commission Termination Act ("ICCTA") was raised on Page 22 of Lincoln North's February 15, 2006 Trial Brief. The ICCTA preemption issue was addressed again on Pages 47-48 of Lincoln North's appeal brief, and further on Pages 13-18 of Lincoln North's June 14, 2007 appellate reply brief. This issue was also raised and briefed on the merits on Pages 12-16 of Lincoln North's Petition for Certification.

The issue of the Federal Post Regional Mail Distribution Center being located in the no-trucking zone was raised on Pages 10-12 of Lincoln North's appellate reply brief, and was further addressed on Pages 16-18 of Lincoln North's Petition for Certification.

The Law Division ultimately rendered a decision that was rife with errors and was marked by an extreme deference to a local municipality and its reckless zoning practices. The Appellate Division affirmed this judgment in a cursory opinion that engaged in no independent legal analysis. Lincoln North sought discretionary review with the New Jersey Supreme Court, which was denied on May 16, 2008. This Petition followed.

REASONS FOR GRANTING THE PETITION

Ordinance 64 is an industry killing measure. Although businesses fail each and every day throughout our nation, there are certain critical industries that cannot be eliminated through misbegotten state action, without raising serious constitutional concerns.

This nightmare, worst-case scenario is what has occurred here. The Town of Kearny, with blind avarice, has enacted a municipal ordinance, Ordinance 64, which will inevitably and inexorably destroy the viability of the largest truck transport center in the New York metropolitan area. This Ordinance will constrict, and eventually destroy, a little-known to the general public, but nevertheless vital, artery of interstate and international commerce. It is respectfully submitted that the Court should exercise its discretion to address, as a matter of first impression, the issue of whether a municipality may be so empowered to engage in such reckless destruction of a vital keystone of commerce and transportation, despite overwhelming federal interests to the contrary.

The restrictions placed upon the trucking industry also include crowding out and starving the trucks' and the railroads' support facilities, which further flies in the face of the mandates of the ICCTA. The New Jersey courts' cramped interpretation of ICCTA preemption runs counter to the decisions of all thirteen Circuit Courts of Appeal.

Perhaps the ultimate, crowning, absurdity of Ordinance 64 is that it extends its expansive "no-trucking zone" to cover the business operations of one of the most trucking-intensive industries in the United States; *i.e.*, the handling and transportation of the United States mails out of a South Kearny's Regional Postal Distribution Center, which, like South Kearny's now threatened truck and train transport, covers no less territory than the entire Northeastern Corridor. Such an outrageous abuse of power is unprecedented in the annals of Anglo-American jurisprudence.

ARGUMENT

I. Review is Warranted To Address An Issue of First Impression Relating To The Scope and Application of the Dormant Commerce Clause to Municipal Ordinances Designed to Destroy Industries which are Vital to the Free Flow of Interstate Commerce.

The Commerce Clause grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. CONST. ART. I, § 8, cl. 3. The Commerce Clause places strict limitations upon the ability of states to erect barriers to the free flow of interstate trade. *Lewis v. B.T. Investment Managers, Inc.*, 447 U.S. 27, 100 S. Ct. 2009, 64 L. Ed. 702 (1980).

The Dormant Commerce Clause bars states "from regulating interstate commerce in a manner which significantly interferes with the national economy." *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 843 (1st Cir. 1988). This doctrine applies not only to states,

but to local and municipal governments as well. *See Dean Milk v. City of Madison*, 340 U.S. 349, 71 S. Ct. 295, 95 L. Ed. 329 (1951).

Although the Commerce Clause "does not explicitly limit state interference with interstate commerce, the Supreme Court nonetheless has held that the clause prohibits states from taking certain actions regarding interstate commerce even absent Congressional action." *Old Bridge Chemicals, Inc. v. New Jersey Dep't of Envt'l Protection*, 965 F.2d 1287, 1291 (3d Cir.), *cert. denied*, 506 U.S. 1000 (1992). It renders null and void laws that place "burdens on interstate commerce [that are] clearly excessive in relation to the putative local benefits." *American Trucking Associations, Inc. v. Whitman*, 136 F. Supp. 2d 343, 349 (D. N.J. 2004), *aff'd*, 437 F.3d 313 (3d Cir.), *cert. denied*, 127 S. Ct. 349 (2006).

This case presents a critical issue of first impression which this Court should decide; *i.e.*, whether the severe impairment of the use of a local artery and chokepoint of interstate commerce, brought about through the throttling of local transport industries in a centralized, strategic commercial location, violates the Dormant Commerce Clause. The closest case on point arose twenty-seven years ago in the Western District of New York in *Pittston Warehouse Corp. v. City of Rochester*, 528 F. Supp. 653 (W.D.N.Y. 1981). In *Pittston*, the City of Rochester passed several ordinances in 1980 that prohibited shipping terminals, warehouses, and distribution centers in its port and changed the zoning from a commercial harbor district to a "River – Harbor District." *Id.* at 656-57. The City also passed an ordinance prohibiting roll-on/roll-off trailer ship service,

which had recently been proposed as a mechanism to expedite the transfer of cargo from truck to ship. *Id.* at 657. A shipping company leasing the port area challenged the ordinances on the grounds that they violated the Dormant Commerce Clause. *Id.* at 657-58.

The City contended that it had validly exercised its police power to protect the environment, public health, safety and welfare. *Id.* at 658. As to the ordinance prohibiting shipping terminals, the City claimed that the ordinances only affected future uses and had no impact upon the existing shipping company because it had been grandfathered as a preexisting nonconforming use. The City argued that anyone seeking to conduct commercial activities at the port could apply for a variance. *Id.*

The District Court rejected the City's argument that there was no cognizable impact on interstate commerce, given the existence of a legal nonconforming use and the ability to apply for variances. The Court concluded that the ordinances "probable impact" on the shipping company and those engaging in interstate commerce at the port was "self-evident." *Id.* at 659.

After finding that the ordinances had an adverse impact upon interstate commerce, the Court turned to the issue of whether they amounted to economic protectionism. *Id.* at 660. The Court found that their effect was to forever halt commercial shipping at the port. As such, the City's action demonstrated "outright economic isolationism and patent economic protectionism", and was "unconstitutionally invalid per se." *Id.*

Pittston thus held that the Commerce Clause cannot tolerate such a result even when only one company is affected. *Pittston* also provides an illustration of a municipality's failed attempt to slowly and systematically strangle a thriving commercial center by nominally permitting the operation of its current operations, while simultaneously crippling its ability to adapt and expand to ever-changing market conditions in violation of the Dormant Commerce Clause. Our rapidly changing global, high-tech computerized knowledge and information economy still has not dispensed with the critical need for trucks to keep our national commercial engines running.

An ironic and paradoxical truth is that as this world and its economy get larger, the power of one person with a computer and one municipality with commercially destructive designs and a reckless determination to implement them, at whatever cost to society, has never been greater. Lincoln North invites this Court to address the Dormant Commerce Clause issue raised in this Petition, in order to protect the national economy from the rogue and constitutionally insubordinate actions of municipalities whose short-sighted overlords seek the fool's gold of short-term real estate tax revenues, their eyes all the while blind to the fact that these same infrastructure destroying measures will harm the national transportation network, and the economy that it keeps afloat. Such strategic dislocations can lead to a widespread and ruinous cascade of economic failures, severe resource distribution disruptions, and chronic market scarcities until the root cause of the problem is isolated. The Constitution does not require the government to wait, perhaps indefinitely, in order to act upon such corrosive threats to our national economic fabric.

II. Review is Warranted To Resolve the Conflict Between All Thirteen Circuit Courts of Appeal and the New Jersey Courts on the Issue of ICCTA Preemption.

Article VI, Clause 2 of the United States Constitution "provides that the laws of the United States shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." The New Jersey state courts rejected, on summary judgment, Lincoln North's argument that Ordinance 64 was subject to preemption under the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10101, *et seq.*, which contains a broad preemption provision. 49 U.S.C. § 10102(6)(A).

CSX, a member of Lincoln North, is a railroad with substantial national operations. It would therefore seem obvious that any attempted local governmental restrictions upon its railroad routes and their necessary support and unloading operations that are its lifeblood would be preempted. Indeed, this is the law of all thirteen Circuit Courts of Appeal. *See Rhymes Heating Oils, Inc. v. Springfield Termination Railway Co.*, 358 F.3d 82 (1st Cir. 2004); *Sullivan v. American Airlines, Inc.*, 424 F.3d 267 (2d Cir. 2005); *New York Susquehanna & W. Railway Corp. v. Jackson*, 500 F.3d 238 (3d Cir. 2007); *Ward v. Allied Van Lines*, 231 F.3d 135 (4th Cir. 2000); *VRC, LLC v. City of Dallas*, 460 F.3d 607 (5th Cir. 2006); *CSX Transp. v. City of Plymouth*, 283 F.3d 812 (6th Cir. 2002); *Gordon v. Allied Van Lines*, 130 F.3d 282 (7th Cir. 1997); *City of Lincoln v. Surface Transp. Bd.*, 414 F.3d 858 (8th Cir. 2005); *Emmert Indus. Corp. v. Artisan Assocs.*, 497 F.3d

982 (9th Cir. 2007); *Port City Properties v. Union Pacific Railroad*, 518 F.3d 1186 (10th Cir. 2008); *Galactic Towing, Inc. v. City of Miami Beach*, 341 F.3d 1249 (11th Cir. 2003); *CSX Transp. v. Williams*, 406 F.3d 667 (D.C. Cir. 2005); and *Presault v. United States*, 100 F.3d 1525 (Fed Cir. 1996). The New Jersey state courts in this case, however, expressly and inexplicably held otherwise. This result cannot stand.

The scope of the defiance of federal law in this area of strong Congressional and national security interests cannot be underestimated. Nor can its potential implications for the viability of a uniform Congressional scheme on the issue of national transportation in the face of challenges from newly assertive states and localities be ignored.

As to the scope of the violation of the law, the expansive reach of the ICCTA extends to all "transportation by rail carrier." *Id.* at § 10501(a); *The New York, Susquehanna & Western Railway Corp. v. Jackson*, 2007 U.S. Dist. LEXIS 11907, *47-48 (D. N.J., Feb. 20, 2007). Covered aspects of "transportation" broadly include the following:

> (A) a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, property, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail, regardless of ownership or an agreement concerning use; and

> (B) services related to that movement, including receipt, delivery, elevation, transfer in transit, refrigeration, icing, ventilation, storage, handling, and the interchange of passengers and property. . . .

The ICCTA defines "rail carrier" as "a person providing common carrier railroad transportation for compensation." 49 U.S.C. § 10102(5). The following transportation support facilities and mechanisms are incorporated in the ICCTA's equally broad definition of "railroad":

> (A) a bridge, car float, lighter, ferry, and intermodal equipment used by or in connection with a railroad;
>
> (B) the road used by a rail carrier and owned by it or operated under an agreement; and
>
> (C) a switch, spur, track, terminal, terminal facility, and a freight depot, yard, and ground, used or necessary for transportation.

Id. at 10102(5). *See Green Mountain Railroad Corp. v. State of Vermont*, 404 F.3d 638, 644 (2d Cir.)(preemption extends to all industries "that rely upon trucks"), *cert. denied*, 546 U.S. 977 (2005).

Other Lincoln North business properties extend far beyond the property lines of CSX and also fall within the preemptive scope of ICCTA. The Law Division never permitted Lincoln North to argue that Lincoln North member American President Lines, Ltd. ("APL") leases an 80-acre property adjacent to CSX, which CSX uses as an auxiliary yard!

The CSX property is approximately 300 acres, 90% of which must be utilized for the movement, transfer, loading and unloading of cargoes that arrive throughout the day and night by rail. Within this bustling hive of international and interstate commerce, there is no room on the CSX property for even the short-term storage of the goods that have been shipped to its railhead. CSX does not have anything close to adequate space to provide for even short-term storage of the massive amounts of materials that are delivered to its railhead every day.

Last year, CSX moved 305,000 trailers out of its gate, an average of 25,416 trailers per month. CSX's property is far too small to permit these trailers to stay on its property as they await pickup and delivery. Trailers must be parked on adjoining properties throughout South Kearny. APL handles only a small fraction of these deliveries, which must then be sent to other Lincoln North members for storage and later transport, lest massive demurrage charges be levied upon the customer.

Just as trucks are still a vital aspect of our national transportation grid, so are our railroads. Congress has acknowledged this through the enactment of omnibus transportation bills and measures such as the ICCTA. In this case, the Town of Kearny, its agents and representatives, aided and abetted by compliant New Jersey courts, have brazenly established an end-around to this critical Congressional Act. Accordingly, it is respectfully submitted that certiorari should be granted on this issue as well.

III. Review is Necessary to Resolve a Clash between Ordinance 64, as interpreted by New Jersey courts, and Federal Criminal Laws, Which Proscribe Interference with the Mails.

Incredibly, Ordinance 64 places the Kearny Postal facility in the no-trucking zone. Does this mean that the Post Office will not be able to truck the mail? This situation is even more mind-boggling when one considers that South Kearny is a Regional Mail Distribution Center for New Jersey's Northeastern Corridor! This is a massive operation, an engine of interstate commerce unto itself, with literally hundreds of mail trucks that operate out of its facilities every day.

Interference with the mails has been federally proscribed on Constitutional grounds for centuries. *Gibbons v. Ogden*, 22 U.S. 1, 184, 9 Wheat 1, 6 L. Ed. 23 (1824); U.S CONST. ART. I, § 8, CL.7. As the Third Circuit noted in *United States v. Lavin*, 567 F.2d 579, 580 (3d Cir. 1977), "Congress has provided criminal penalties for activities that interfere with the Postal Service's mandate to deliver the mail." *See* 18 U.S.C. § 1702; 18 U.S.C. § 1703(a).

These criminal statutes, juxtaposed with Ordinance 64, have raised the possibility of the disruption of Kearny postal facilities and the inevitable clash of sovereignties and the consequent incarceration in federal prison of municipal agents who are called upon to either (1) enforce Ordinance 64 and risk arrest; (2) ignore the Ordinance and risk losing their jobs; or (3) without any guidance from a patently irrational legislative body, make their own subjective judgments.

The bizarre possibility of a municipal "crackdown" on the Post Office is but one more reckless act of a municipality that does not read and/or understand what it enacts and certainly does not comprehend what its consequences are. Certiorari should be granted in order to clarify the boundaries of federal and state power that Ordinance 64 has chosen to unlawfully ignore.

CONCLUSION

In *McCulloch v. Maryland*, 17 U.S. 316, 431, 4 Wheat 316, 4 L. Ed. 579 (1819), this Court, per Chief Justice John Marshall, pronounced that "the power to tax involves the power to destroy." In our modern administrative state, this same reasoning applies to the State's zoning power. The Town of Kearny is attempting to regulate the most concentrated component of the trucking industry in the Northeastern United States out of existence.

This ubiquity of trucked goods is a little-known, but obvious, fact. Virtually everything we have in our homes and our offices is delivered by truck. One need not be an expert as to interstate commerce to comprehend the following indisputable fact: If the Justices of this Court look around their individual chambers, go to the cafeteria, or otherwise do anything that must be accomplished in the ordinary course of courthouse business, you will note that virtually everything in the building — tangible property, foodstuffs, the very foundations of the courthouse — were at one time trucked to Washington, D.C. Moreover, these critical items which enable the Court to conduct its daily business more than likely were trucked from multiple destinations, one of which was, with a high degree of probability, South Kearny.

Given the prevalence of anti-trucking prejudice, there is nowhere else for Lincoln North's members to go. So, under the relentless stress of Ordinance 64, these businesses will, slowly but surely, close down, and a central magnet of interstate, indeed international, commerce will be eliminated.

All court decisions, even those nominally not-for-publication, are instantly accessible in our 21st Century information age. Thus, the decisions upholding Ordinance 64 can cause considerable jurisprudential mischief. Accordingly, Lincoln North respectfully requests that this Court grant its Petition for Certiorari and invalidate Ordinance 64 on the grounds that it violates the Commerce Clause, is substantially preempted by the ICCTA, and unlawfully seeks to interfere with the federal mails.

Respectfully submitted,

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Dated: August 13, 2008

APPENDIX A — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION DATED MARCH 19, 2008

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1960-06T5

LINCOLN NORTH DEVELOPMENT CORPORATION,

Plaintiff-Appellant,

v.

TOWN OF KEARNY, a municipal corporation of the State of New Jersey, ALBERTO SANTOS, in his official capacity as Mayor of the Town of Kearny, TOWN COUNCIL OF THE TOWN OF KEARNY, TOWN OF KEARNY PLANNING BOARD,

Defendants-Respondents.

Argued January 8, 2008 – Decided March 19, 2008

Before Judges Coburn, Fuentes and Chambers.

PER CURIAM

In this action in lieu of prerogative writs, plaintiff, an association of South Kearny businesses, sought to invalidate Ordinance 64, passed by the Town of Kearny on November 9, 2004. Plaintiff has brought this appeal

seeking to overturn the trial court's decision upholding the Ordinance. We affirm.

South Kearny consists of a 1.5 square mile area that is physically separated from the rest of Kearny and is bordered by the Hackensack River on the east, the Passaic River on the west, the Newark Bay on the south, and a large railroad yard and the Hackensack Meadowlands on the north. No residential housing is located in South Kearny. Due to its proximity to major highways, namely the New Jersey Turnpike, Routes 1 and 9, Route 78 and Route 280, and the railroad line, South Kearny has substantial truck terminals and truck-related activities.

Prior to the enactment of Ordinance 64, truck terminals and trucking related activity had been permitted throughout South Kearny. Ordinance 64 changes that arrangement by dividing South Kearny into two zones: South Kearny Industrial North (SKI-N) and South Kearny Industrial South (SKI-S). A major distinction between the two zones is that certain trucking uses are not permitted as principal uses in SKI-S while they are permitted uses in SKI-N. Specifically, Ordinance 64 allows the "storage, parking or use of trucks, tractors, trailers, containers or any similar structure for storage purposes on a permanent basis" in SKI-N, but prohibits those uses in SKI-S. According to the municipality, the creation of the two zones is designed to achieve a balance in South Kearny between trucking uses on one hand and warehouse/distribution and other uses on the other, and to encourage

redevelopment in South Kearny which would increase tax ratables.

Ordinance 64 seeks to promote a better visual environment by requiring that "[a]ll operations, activities and storage . . . be conducted within completely enclosed buildings." However, certain exceptions from this requirement are allowed in the SKI-N zone, including outdoor storage of containers and off street parking and loading, so long as a twenty-five foot buffer zone with landscaping is provided. In addition, outdoor containers may not be stacked more than two containers high.

Plaintiff objected to various provisions in the Ordinance, including the exclusion of trucking uses in SKI-S and the twenty-five foot buffer and the two-container stacking limit for outdoor container storage. Plaintiff also objected to the placement of the boundary between the two zones, contending that many existing trucking uses are now in SKI-S.

In this action in lieu of prerogative writs commenced on December 28, 2004, plaintiff asserted numerous claims against the Town of Kearny and its mayor, town council, and planning board, including contentions that the ordinance is arbitrary and capricious and that it violates various constitutional provisions and federal statutes.

After discovery, the trial court decided defendants' motion for summary judgment, issuing a comprehensive

forty-one page written decision dated May 4, 2006. The trial court dismissed plaintiff's claims in count two (alleging that the ordinance constitutes an unconstitutional taking of property), count three (alleging that the ordinance unconstitutionally impinges on plaintiff's members' freedom of contract by interfering with existing contractual obligations essential to their businesses, and alleging that the ordinance violates the Federal Commerce Clause by impairing the flow of interstate commerce), count four (federal equal protection claims only), count seven (alleging that the ordinance is inconsistent with the Town's Master Plan, and therefore violates the Municipal Land Use Law), count eight (alleging certain procedural defects in the adoption of the ordinance), and count nine (alleging inconsistencies between the boundary line between SKI-N and SKI-S and the boundary line in an earlier Master Plan). The trial court rejected plaintiff's additional arguments, which were not in plaintiff's complaint but were raised in its brief, that to the extent the ordinance restricts truckers who transported and stored hazardous wastes, the ordinance is preempted by the Federal Hazardous Materials Transportation Act (HMTA), 49 *U.S.C.A.* §§ 5101 to -5128. The trial court also rejected plaintiff's argument that the ordinance affected railroad property, and was therefore preempted by the Interstate Commerce Commission Termination Act (ICCTA), 49 *U.S.C.A.* §§ 10101 to -16101.

The trial judge found that plaintiff was entitled to a plenary hearing on count one (alleging that the

ordinance is arbitrary and capricious, and an unconstitutional attempt to regulate land use), count four (alleging due process claims), and count five (alleging that the ordinance is an impermissible exercise of the Town's police power). A plenary hearing on these counts was held on September 18, 19 and 20, 2006.

At the plenary hearing, plaintiff presented the testimony of Roger DeNiscia, a professional planner who was critical of Ordinance 64 and who testified as an expert witness. William Moscatello, the owner of Block 289, Lots 15 and 15R, located in the SKI-S zone, testified that his property had been used for trucking storage and freight forwarding for at least twenty years, and maintained that Ordinance 64 made his property "basically useless." Frank Kearny, another property owner, also testified to the negative impact that Ordinance 64 would have on his property. Defendant presented the testimony of Michael Martello, the town construction official zoning officer, and Susan Gruel, a professional planner who testified as an expert witness.

After the plenary hearing, in a twenty-five page written decision dated October 27, 2006, the trial court rejected plaintiff's claims. The trial court found that the Ordinance advanced the purposes of the Municipal Land Use Law, as set forth in *N.J.S.A.* 40:55D-2(a), (g), (i) and (m). The trial court noted that the ordinance guided development to promote the public health, safety, morals and general welfare and promoted a desirable visual environment. Further, Ordinance 64 was found to be substantially consistent with the Master Plan and

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Reexamination Report of that Master Plan made in July 2002, as required by *N.J.S.A.* 40:55D-62(a). The trial court also found that the balance sought by Ordinance 64 between warehousing and distribution in the SKI-S and trucking facilities in SKI-N "represents a valid zoning purpose." Relying on Gruel's testimony and a color-coded map admitted into evidence, the trial court determined that there was a rational basis for the boundary selected since the "identification of *most* of the trucking terminal facilities in the north zone has been proven to the court's satisfaction." The trial court also determined that the screening and buffer requirements for storage facilities and the limit on the height of stacking containers were reasonable and served a valid planning purpose.

In this appeal plaintiff raises the following points:

POINT I

ORDINANCE 64 CANNOT STAND. A MULTITUDE OF FACTS, EVIDENCE AND ARGUMENTS SUPPORT THE LEGAL CONCLUSION THAT ORDINANCE 64 MUST BE STRICKEN IN ITS ENTIRETY ON THE GROUND THAT IT IS ARBITRARY AND CAPRICIOUS. ORDINANCE 64 IS INTERNALLY INCONSISTENT AND ABSURD IN ITS APPLICATION. IT VIOLATES A LONGSTANDING PRINCIPLE OF NEW JERSEY ZONING LAW GOVERNING DOMINANT USES OF PROPERTY AND IT IS SO INTRUSIVE OF FEDERALLY PRO-

TECTED COMMERCIAL INTERESTS THAT IT VIOLATES THE CONSTITUTIONAL PROSCRIPTION AGAINST INTERFERENCE WITH INTERSTATE COMMERCE, ALONG WITH A HOST OF OTHER LEGAL AND CONSTITUTIONAL VIOLATIONS.

A. ORDINANCE 64 IS SELF-CONTRADICTORY, AND ITS LITERAL ENFORCEMENT WOULD RESULT IN ABSURD REQUIREMENTS AND APPLICATIONS AND CREATING NON-CONFORMING USES OF THE MAJORITY OF THE PROPERTIES IN SOUTH KEARNY. ITS NEW MANDATES ARE SO SELF-CONTRADICTORY AS TO RENDER IMPOSSIBLE ANY ATTEMPTS AT FUTURE ENFORCEMENT ABSENT THE ARBITRARY AND CAPRICIOUS SELECTION OF ONE CONTRADICTION OVER ANOTHER. ACCORDINGLY, ORDINANCE 64 IS ARBITRARY, CAPRICOUS AND UNENFORCEABLE.

(i) The Absurdities Arising From the Maximum Yard Requirement Issue Render Ordinance 64 Arbitrary and Capricious.

(ii) The Irreconcilable Conflict Between Yard Requirements and Bulk Requirements.

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(iii) The Wide "Screen" or Buffer Mandated in the Northern Zone Renders the Ordinance Arbitrary and Capricious.

B. ORDINANCE 64 SHOULD BE STRUCK DOWN BECAUSE IT OUTLAWS AND RENDERS NONCONFORMING WHAT HAD PREVIOUSLY BEEN THE DOMINANT USE IN THE AREA.

C. THE TOWN OF KEARNY'S DUAL ACKNOWLEDGEMENT IN THE REEXAMINATION REPORT OF A PREDICTED LOCAL EXPLOSION IN COMMERCIAL ACTIVITY AS A RESULT OF THE PORTWAY PROJECT AND THE ORDINANCE'S CONCOMITANT SELF-SABOTAGE OF THE AFFECTED AREA'S ABILITY TO ACCOMMODATE THIS ANTICIPATED EXPANSION RENDER THE ORDINANCE ARBITRARY, CAPRICIOUS, NULL AND VOID.

D. THE REQUIREMENT THAT ALL ACTIVITIES BE CONDUCTED IN COMPLETELY ENCLOSED AREAS IS ARBITRARY AND CAPRICIOUS.

E. ORDINANCE 64'S STRICT LIMITATIONS ON CONTAINER STORAGE ARE ARBITRARY AND CAPRICIOUS.

F. THE UNEXPLAINED ALTERATION OF THE DIVIDING LINE BETWEEN THE NORTHERN AND SOUTHERN ZONES IS ARBITRARY AND CAPRICIOUS.

G. THE DIVIDING LINE SPLITTING MELON LEASING, CSX AND HUDSON CIRCLE PROPERTIES, WHICH HAVE THE SAME TRUCKING USES, INTO PARTIAL-NORTHERN AND PARTIAL-SOUTHERN ZONE PROPERTIES IS ARBITRARY AND CAPRICIOUS.

THE TRIGGERING OF ORDINANCE 64 AND OBTAINING A VARIANCE AS A "REMEDY."

POINT II

ORDINANCE 64'S EVISCERATION OF SOUTH KEARNY'S NATIONAL TRUCKING INDUSTRY CANNOT WITHSTAND SCRUTINY UNDER THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION.

POINT III

ORDINANCE 64 CONFLICTS WITH AND IS PREEMPTED BY FEDERAL LAW RELATING TO TRUCKING OF HAZARDOUS SUBSTANCES.

Appendix A

A. PREEMPTION UNDER THE HAZARDOUS MATERIALS TRANSPORTATION ACT.

B. PREEMPTION UNDER THE INTERSTATE COMMERCE TERMINATION ACT.

POINT IV

ORDINANCE 64 VIOLATES THE SUBSTANTIVE COMPONENT OF THE DUE PROCESS CLAUSE.

POINT V

ORDINANCE 64 EXCEEDS THE TOWN OF KEARNY'S POLICE POWERS.

POINT VI

ORDINANCE 64'S PUNITIVE MEASURES AGAINST TRUCKING ISSUES, IN STARK CONTRAST TO OTHER PERMITTED USES, VIOLATES THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION, AS WELL AS THE GUARANTEE OF EQUAL PROTECTION UNDER THE NEW JERSEY CONSTITUTION.

POINT VII

ORDINANCE 64 CONSTITUTES AN UNLAWFUL TAKING WITHOUT JUST COMPENSATION UNDER THE UNITED STATES CONSTITUTION AND THE NEW JERSEY CONSTITUTION.

POINT VIII
ORDINANCE 64 VIOLATES LINCOLN NORTH'S CONSTITUTIONAL LIBERTY OF CONTRACT.

POINT IX
THE PROCLAMATION OF ORDINANCE 64 WAS BESET WITH PROCEDURAL IRREGULARITIES WHICH MANDATE ITS INVALIDATION.

When reviewing the trial court's decision on a motion for summary judgment, we must employ the same standard that governs the trial court. *Prudential Prop. & Cas. Ins. Co. v. Boylan*, 307 *N.J.Super.* 162, 167 (App. Div.), *certif. denied*, 154 *N.J.* 608 (1998). The motion will be granted where there is "no genuine issue as to any material fact," and the movant is entitled to judgment as a matter of law. *R.* 4:46-2(c). We must deny the motion if, after looking at the evidence in the light most favorable to the nonmoving party, a rational fact finder could hold in that party's favor. *Brill v. Guardian Life Ins. Co. of Am.*, 142 *N.J.* 520, 540 (1995). Thus, to grant plaintiff summary judgment, we must find after giving defendant the benefit of all of the favorable inferences that can be drawn from the evidence, that no rational fact finder could hold for defendant. Further, where the motion involves questions of law, this court owes no deference to the trial court on the legal questions. *See Manalapan Realty, L.P. v. Twp. Comm. of Manalapan*, 140 *N.J.* 366, 378 (1995).

Appendix A

We have reviewed with care the trial court's forty-one page written decision dated May 4, 2006, deciding defendant's motion for summary judgment, and discern no basis to disagree with the determinations made in that decision, all of which are wellsupported by the law and undisputed facts.

When considering the determinations made by the trial court after the plenary hearing, we defer to the credibility findings made by the trial judge. Because a trial court " 'hears the case, sees and observes the witnesses, [and] hears them testify,' it has a better perspective than a reviewing court in evaluating the veracity of witnesses." *Cesare v. Cesare*, 154 *N.J.* 394, 412 (1998). However, we owe the trial court no special deference on questions of law. *Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, supra*, 190 *N.J.* at 378.

After a careful review of the record and the applicable law, we affirm substantially for the reasons set forth by the trial judge in his comprehensive opinion of October 27, 2006. We note that plaintiff's contention that Ordinance 64 has an internal conflict between certain maximum yard requirements and minimum bulk requirements was not addressed by the trial judge, since it was not properly raised below. For that same reason, we decline to address this argument.

Affirmed.

APPENDIX B — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY DATED OCTOBER 27, 2006

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — HUDSON COUNTY
DOCKET NO. L-1-05

Civil Action

LINCOLN NORTH DEVELOPMENT CORPORATION,

Plaintiff

v.

TOWN OF KEARNY, a municipal Corporation of the State of New Jersey, ALBERTO SANTOS, in his official Capacity as Mayor of the Town of Kearny, TOWN COUNCIL OF THE TOWN OF KEARNY, TOWN OF KEARNY PLANNING BOARD,

Defendants.

Date of Plenary Hearing: September 18-September 20, 2006

Date of Decision: October 27, 2006

Appendix B

OPINION

Summary of Action

This is a prerogative writ filed by plaintiff, Lincoln North Development Corporation, who seeks to invalidate Kearny's municipal zoning ordinance, in particular, Zoning Ordinance No. 64, which created two (2) subzones within the area known as South Kearny—the SKI-S zone and the SKI-N zone. The major distinction between the two districts is that truck terminals are not permitted as a principal use within the SKI-S zone. The South Kearny Industrial Peninsula consists of approximately 1,000 acres in size and has excellent road, rail, and water transportation linkages, sometimes referred to as intermodal facilities. Plaintiff is a group of property owners who own property in both subzones in South Kearny.

This litigation was the subject of extensive briefing on motions for summary judgment resulting in the Court's 41 page letter opinion dated May 4, 2006, which the Court herein incorporates by reference. The Court specifically incorporates in this decision the summary of the action at pages 2-11 of the May 4, 2006 written decision which sets forth the history of Ordinance No. 64. The scope and rationale for the Court requiring a plenary hearing on certain issues which took place on September 18, 19 and 20, 2006 was also set forth in the Court's opinion of May 4, 2006, which this decision now resolves. The primary issue that the Court found survived the dispositions by the Court as a matter of

law in favor of the defendants[1] was whether plaintiff has presented sufficient evidence that could support a finding that the ordinance violates the principals of sound zoning embodied in the municipal land use law (hereinafter "MLUL"). If so, an evidentiary hearing must be held to give both the party challenging the ordinance and the municipality an opportunity to present testimony including *expert testimony* relevant to this issue. *Saratoga v. Borough of Harrison*, 346 *N.J.Super.* 569, 579 (App.Div.2002), *cert. dn.* 172 *N.J.* 357 (2002).

The Court, in its decision of May 4, 2006 and its pretrial order of June 7, 2006, identified the following issues to be determined at trial which is now the subject of this decision:

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1. The claims rejected by this Court in its May 4, 2006 Opinion are as follows:

A. Count 2: Taking without just compensation;
B. Count 3: Interference with Contract and Interstate Commerce Clause;
C. Count 4: Issues of Equal Protection
D. Count 6: Issues of devaluation of land;
E. Count 7: Inconsistency with Master Plan & MLUL
F. Count 8: Procedural Defects; Invalidity due to notice requirements;
G. Count 9: Inconsistency of Boundary Line;
H. Preemption Issues regarding the Hazardous Materials Transportation Act (HMTA) & Interstate Commerce Commission Termination Act (ICCTA);
I. Damages.

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Count 1 – Whether the Town of Kearny acted arbitrarily, capriciously and unreasonably in its formulation of Ordinance No. 64 and the regulation of the use of certain land?

Count 4 – Whether the Town of Kearny denied the substantative due process rights of the plaintiff in formulation of Ordinance No. 64 and the regulation of land use?

Count 5 – Whether the Town of Kearny abused its police powers in the formulation of Ordinance No. 64 and the regulation of land use of certain land?

The primary issues presented above also trigger an inquiry to determine if the zoning ordinance meets certain objective criteria, more specifically:

1. Does Ordinance No. 64 advanced one of the purposes of municipal land use law as set forth in *N.J.S.A.* 40:55D-2?

2. Is Ordinance No. 64 substantially consistent with land use plan element and the housing plan element of a Master Plan or design to effectuate such plan elements, *N.J.S.A.* 40:55D-62, unless the requirements of that statute are otherwise satisfied?

3. Does Ordinance No. 64 comport with constitutional constraints on the zoning power including those pertaining to due process, equal protection and the prohibition against confiscation?

See, Riggs v. Township of Long Beach, 109 *N.J.* 601, 611-612 (1988).

There is a presumption of validity that attaches to the ordinance with the challenger overcoming the presumption only by showing that the ordinance is clearly arbitrary, capricious or unreasonable or plainly contrary to the fundamental principals of zoning. Moreover, unless the zoning ordinance infringes upon a fundamental right, there is no requirement that it recite "tangible specific objectives permitted by the ordinance in order for the ordinance to be valid." *Zelinsky v. Zoning Bd. of Adjustment of Verona*, 105 *N.J.* 363, 371 (1987). The municipality may rely entirely upon planning objectives first identified during litigation in defending the validity of the Ordinance; and to sustain a constitutional attack, plaintiff must *rule out* any set of facts that reasonably supports the ordinance. *Zelinsky*, 105 *N.J.* at 371.

The thrust of plaintiff's attacks addressed at the evidentiary hearing revolve around the testimony of their planning expert witness, Roger De Niscia, of Bergin Engineering Associates, whose report was admitted into evidence by consent. The synopsis of his

opinion as to the insufficiencies of Ordinance No. 64 can be synopsized as follows:

(1) The ordinance which created a boundary line between North and South Kearny creates an irregular zone.

(2) The ordinance creates certain non-conforming motor freight uses and suggests that there was an improper omission of properties from the trucking zone which would preclude the extension of motor freight uses which occur adjacent to those properties, and concludes that the boundary lines are therefore arbitrary and capricious.

(3) Attacks the bulk changes and the use conditions on container standards, more specifically, the restriction in maximum heighting of container storage stacking under Section 38-4.6, of two containers is an undue restriction on height. He suggests that the height limitation of two container size should be expanded to a height of 80 feet or 6 stories as this is the building height in the SKN-N district. He contends that the limitation is without any foundation and is arbitrary. He also suggests the conditional use restriction limiting container height is unreasonable per se.

(4) He also cites the negative effect in creating potential non-conforming use status for all motor freight uses where such stacking occurs. He asserts that by omission of existing motor freight uses in the *south* zone, non-conforming issues will be created.

Mr. DeNiscia reviewed the background documents leading up to Ordinance No. 64 including a 1991 Master Plan, which placed the boundary lines further south on Lincoln Highway. He acknowledged that most of the motor freight operations were north of Lincoln Highway. However, he opined that the boundary line created in Ordinance No. 64 created non-conforming uses in violation of the proper planning prospective that one should avoid the creation of non-conforming uses. He opined that the Ordinance had a tendency to discourage *intermodal* uses, which means transportation of goods in one area by sea, land and rail. He identified the property owned by Mr. Moscatello (see his testimony 1, *infra*, pg. 8) is one that should not be in the south zone, and opined that the boundary line should be along Lincoln Highway where it was originally in 1991 referring to the street as a "natural boundary". He cited what he perceived as a conflict in the July 2002 Master Plan Reexamination Report, which cited increased activity in South Kearny based upon the expansion of port system and need for an increase in the number of intermodal facilities, but by restricting the trucking facilities under Ordinance No. 64 particularly in the south, the development of intermodal facilities would be discouraged.

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Mr. DeNiscia indicated that the Reexamination Report does not identify any specific bulk restrictions including those applicable as to container trailer storage and, therefore, their inclusion in the Ordinance was improper. He also does not agree with the two (2) stack limitation on trailer storage. He opined that there was an inconsistency between the 25 foot landscape strip along the boundary of outdoor storage generally in 38-6[A](1)and the 25 foot wide landscaped buffer for containers under 38-6.6[F](n). Mr. DeNiscia testified also that the buffer concept is not supported by the Reexamination Report.

The Reexamination Report at page 13 does say that:

> "it is also recommended that the new zoning districts contain new bulk and design standards to further regulate the physical appearance in the area and create a modern industrial setting. In particular, it should be placed upon the setbacks permitted storage areas, container storage heights, screening and signage."

While not commented upon in his expert report provided in discovery, Mr. DeNiscia asserts in his opinion that the maximum yard requirements under Ordinance No. 64 is probably a typographical error and was probably, meant to read "minimum" yard requirements.

On cross-examination, Mr. DeNiscia could not identify various uses on the various blocks and lots set

forth on the maps which were marked into evidence at trial, as the last time Mr. De Niscia was at the site was 2001.

He believed that one of the owners of Block 293, APL, was stacking containers in 2001 and did not know what they were doing at that time. He acknowledged on cross-examination that warehousing distribution is a permitted use of the site. He also agreed *generally* with Kearny's Planner, Ms. Gruel, whose firm prepared the 2002 Reexamination Report, that reducing the number of truck terminals was necessary for the area to reach its full potential.

The first fact witness called by plaintiff was property owner William Moscatello who owns a property known as Block 289, Lot 15, which is adjacent to the boundary line and within the SKI-S subzone. He testified that the property for the last 20 years was used for trucking storage and since he owned the property for the last six years, it has been a truck terminal, parking, boarding and storage. He testified that there are trailers on-site used as offices and there are no large structures. He testified that he had the same use of the property as Lot 18 which was adjacent to his property and which was on the other side of the boundary. Mr. Moscatello also described uses of property south of his lot within the south-subzone boundary and his familiarity with the area and the historical use of Lot 14 as a transfer station. He spoke of his familiarity with the use of Lot 15R with the presence of some trailers that are flush with the ground, others are on chassis.

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Plaintiff's attorney then queried Mr. Moscatello regarding his knowledge of Section 38-4.6 of Ordinance No. 64, which provides for storage of containers in the north zone on a conditional only use with a restriction that the containers should not be permitted to be stacked more than two containers high. Significantly, the predecessor ordinance prohibited trailer storage *throughout* South Kearny, and both parties acknowledged that existing trailer storage use would be protected as a continued non-conforming use. Plaintiff's attorney queried his fact witness, Mr. Moscatello, as to his "opinion" about the impact of Section 38-6.6 in Ordinance No. 64, which requires that all operations, activities and storage must be conducted within completely enclosed buildings in both the north and south zones. Mr. Moscatello contended that while Section 38-6.6 would be too restrictive as far as his development of the property, no one had approached him for use of property that would trigger a requirement for enclosed buildings. Mr. Moscatello testified he has not changed the operation of his property since the adoption of Ordinance No. 64.

The next witness presented by plaintiff was a property owner who owned and sold various parcels of property in the South Kearny area, Mr. Frank Kearny. Neither Mr. Moscatello or Mr. Kearny were offered as experts in *any* field. Most of Mr. Kearny's property is located in the north subzone but he does own two properties in the south subzone. He also gave his "opinion" about the conditional uses under Section 38-6.6, that it would render his properties in the south

subzone worthless because based on the narrowness of his lots he could not construct a building for outdoor uses if there was a 25 foot setback requirement.[2]

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2. In Ordinance No 64, the following new sections were added to the conditional use section:

Section 38-6.6 "Conditional Uses" was amended and superseded by the addition of the following relevant sections:

> [A](i) *Outdoor Uses*—All operations, activities and storage shall be conducted within completely enclosed buildings in both the SKI-N and SKI-S zones, except that the outdoor storage of containers, off street parking and loading, accessory lumber yards and home improvement centers may be permitted in the SKI-N Zone only and only if they shall comply with the following requirements:
>
> 1. There shall be a 25-foot wide strip of landscaped open space for heavy vegetative screening along its borders;
>
> 2. All uses shall be subject 38-6.6.h;
>
> 3. All uses shall be paved and curbed in accordance with the Design Standard as set forth in 36-12.
>
> *n. Containers.* Container storage is only permitted within the SKI-N district and subject to the following conditions:
>
> 1. Containers shall not be stacked more than two (2) containers high.
>
> 2. **There shall be a minimum 25-foot wide landscaped buffer along the rear and side property lines.** Buffer shall contain a combination of deciduous and evergreen trees and shrubs and berming

(Cont'd)

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Again, no one questioned the fact that all of existing uses of the two (2) property owners called to testify by plaintiff were not effected by existing non-conforming use protocols. He identified his ownership of Block 291, Lot 1 in the north district involves trucking, as mostly straight jobs (trucks without trailers), and garage operations. Trucks used on the properties he owned are parked outside. He identified his ownership of Block 291, Lot 2D again in the north zone has outside storage, two (2) 5000 square foot buildings and complained that any additional development would require storage with enclosed buildings and complained that if he did so, he would have to pay taxes. Again, he contends the narrow lot sizes would present problems with respect to any attempt to construct any buildings. He identified other properties in the north subzone with the same problems.

(Cont'd)

necessary to visually screen the proposed use upon installation. At installation, plant material shall be sized a minimum of:

i. Deciduous trees 3" caliper.

ii. Evergreen trees 6' in height, B & B

iii. Deciduous and evergreen shrubbery 5-gallon container or 36" B & B

iv. Preference shall be given to native species.

v. No plant prohibited within the NJMC shall be permitted.

3. Wetland plantings shall conform to most recent adopted Landscape and Open Space Guidelines established by the New Jersey Meadowlands Commission.

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Mr. Kearny has not been required to make any changes to any of the operations to property he owned in the north zone or in the south zone since Ordinance No. 64 was adopted and has not been cited for violating Ordinance No. 64. He acknowledged that he has bought and sold property before and after the adoption of Ordinance No. 64.

The first witness called by defendant is the current Construction Official, Michael Martello, who also serves as Zoning Officer of the Town of Kearny. He has held these positions with Kearny for the last 16 years. Based on his knowledge of the area, he disputed plaintiff's fact witness who identified trucking facilities in the south subzone. For example, he testified that Block 289, Lots 11A and 11, is a sludge recycle site and not a trucking company. Block 289, Lot 3 in the south zone is a warehousing and distribution facility terminal. Block 290, Lot 6, 7, 9 and 15 is a truck stop, not a trucking terminal. Mr. Martello authenticated the accuracy of Exhibit D-24, a color coded map of South Kearny, which the Court found very helpful, as to the location of trucking operations and non-trucking operations in South Kearny. With very few exceptions, the boundary line appears to locate all ongoing trucking terminals in the north zone.

In addition, he testified that he knows of no operators who stack containers in all of South Kearny above one level, although Ordinance No. 64 permits the stacking of containers two (2) high. Significantly, under the prior ordinance, Section 38-4.5, container storage on a permanent basis was prohibited throughout South Kearny.

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Defendants next presented their planning expert Susan Gruel. Her qualifications were stipulated to as a licensed professional planner with a masters in planning. Her company was in charge of the preparation of the Master Plan Reexamination Report of South Kearny in July 2002. The Land Use Plan element of that report included the South Kearny area and, more specifically identified this element:

> (1) To rezone the South Kearny Industrial area into two distinct districts, SKM-1 and SKM-2 so as to create a better planned balance between pure trucking terminal uses and other terminal uses; and
>
> (2) To encourage redevelopment in South Kearny which maximizes as built tax ratables and readjust a land use imbalance which exists between the South Kearny area, which contains a dominance of trucking terminals.

South Kearny, according to Ms. Gruel, is a mixture of industrial and trucking operations, and also contains a small amount of commercial and public/quasi public property. She concluded in the 2002 Master Plan Re-Examination Report, which her firm authored, that in order for South Kearny to fully benefit from the Plan's regional port and transportation improvements, it was essential to establish a *balance* between warehouse/ distribution and trucking facilities stating that:

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> Central to this balance is ensuring that intermodal-oriented truck uses do not monopolize the peninsula's transportation network or land area. While the continued movement of trucks in distribution-activities is important to South Kearny's economy, the long-term storage of trucks and trailers is not a productive use of limited land and results in visual blight. Exhibit D-1, pg. 13.

In order to achieve the desired balance discussed in the 2002 Master Plan Re-Examination Report, the report recommended that South Kearny be re-zoned into two new districts, South Kearny Industrial North (SKI-N) and South Kearny Industrial South (SKI-S). Again, the major distinction between the two districts is that truck terminals are not permitted as a principal use within the SKI-S sub-zone. In order to determine the appropriate boundary lines between the two districts, the 2002 Master Plan Re-Examination Report considered a number of factors, primarily, the *existing* land use in South Kearny. Ms. Gruel identified the goals and objectives and recommendations of the 2002 Master Plan Re-Examination Report to be consistent with the Municipal Land Use Law (MLUL), particularly as follows:

> 1. Section 40:55D-2.a. To encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare;

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2. Section 40:55D-2.g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;

3. Section 40:55D-2.i. To promote a desirable visual environment through creative development techniques and good civic design and arrangements;

4. Section 40:55D-2.m. To encourage coordination of various the public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land;

Ms. Gruel testified that the requirements in 40:55D-62(a) were also met by the creation of the two sub-zones under Ordinance No. 64 because (1) the Ordinance related to a major extent of uses of land and of buildings and structures thereon; and (2) it was adopted after the planning board had adopted the land use plan element and the master plan and all of the provisions of such zoning with the land use plan element and the house element of the master plan or designed to effectuate such plan; and (3) the ordinance was drawn with a reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land.

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A boundary line between the two (2) subzones, was originally recommended in a *different location* in the 1991 Master Plan Reexamination Report. In addition, this prior boundary line was much more restrictive in the size of the zone where truck terminals would not be permitted. She concludes in her report that the recommendation to create this SKI-N and SKI-S zones and recommended boundaries of those zones were made with the intent of upgrading South Kearny functionally and economically by achieving a balance of warehouse/ distribution and trucking uses. Those recommendations were considered when the governing body adopted Ordinance No. 64 on November 9, 2004, now under current review by this Court.

Ms. Gruel looked at the entire history of this going back to the original 1991 Master Plan to build on these two objectives. First as to the imbalance that existed in the zone, Ordinance 64 seeks to restore a balance of intermodal transportation in South Kearny, in particular, the trucking factor *and* the warehousing and distribution factor. The balance could be restored on those two components and provides a greater opportunity for warehousing distribution. Again, she defined intermodal transportation as the moving and storing of goods by particular forms of transportation, land, rail and water. Generally, based upon her exhausted review of the area at the time of the Reexamination Report, warehousing is in the south sector. Using a color coded map, (D-34), she demonstrated that most of the trucking facilities are located in the north zone. Ms. Gruel identified the need

to address the aesthetics of the business operations in the zone. She also commented that when trying to look towards the improvement of a developed area, it is almost impossible to avoid nonconforming issues. Since the 1991 Master Plan there has been more emphasis on intermodal uses according to Ms. Gruel. In addition, her inspection of the area during her preparation of the reexamination report indicated there is virtually no stacking of containers and, therefore, the two (2) stacking limit as to height is not an unreasonable restriction.

In cross-examination, Ms. Gruel indicated that because there may be some nonconforming uses does not mean the boundary line established is not in keeping with proper zoning purposes.

THE COURT'S FINDINGS

Plaintiff's burden of proof which is not insubstantial, has *not been met. See decision*, pp. 4-5, *supra.*

The Court makes the following findings of fact and conclusions of law:

(1) The goals and objectives of the South Kearny 1991 Master Plan were: 1) to rezone the south Kearny industrial area into two districts (then SKM-1 and SKM-2) so as to create a better plan balance between pure trucking terminal uses and other uses, and 2) to encourage redevelopment in South Kearny which maximizes as-built tax ratables and readjusts a land use

imbalance, which exists between the South Kearny area that contains a dominance of trucking terminals.

This perspective was continued in the 2002 Master Plan Reexamination Report which recognized that in order for South Kearny to employ benefits from the regional improvements in the area it was *essential* to establish a balance between warehouse/distribution and trucking facilities. Central to this balance is ensuring that intermodal-oriented truck uses do not monopolize South Kearny's area transportation network. (Gruel testimony. *See also,* Reexamination Report, Exhibit D-1).

(2) The Municipal Land Use purposes are advanced by Ordinance 64 under *N.J.S.A.* 40:55D-2(a), (g), (i) and (m). Purpose (a) is advanced as Ordinance 64 encourages municipal action to guide the appropriate use or development of all lands in the state in a manner which will promote the public health safety, morals and general welfare. (Gruel testimony). Purpose (g) is advanced by Ordinance No. 64, as it is designed to provide a sufficient space and appropriate locations for a variety of residential and recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of New Jersey residents. (Gruel testimony). Purpose (i) is advanced as Ordinance No. 64 promotes a desirable visual environment through creative development techniques and good civic design and arrangements. (Gruel testimony). Additionally, courts have acknowledged the preservation of property values and aesthetics as a legitimate exercise of police

power. *General Food Vending, Inc. v. Town of Westfield*, 288 *N.J.Super.* 442 (Law Div.1995) Purpose (m) is also advanced as Ordinance No. 64 encourages coordination of the various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land. (Gruel testimony).

(3) An ordinance is considered valid if it, (a) advances at least one of the purposes of the Municipal Land Use Law, (b) is substantially consistent with the land use and housing plan element of the master plan elements, (c) comports with constitutional restraints on the zoning power, including those pertaining to due process; and (d) is adopted in accordance with statutory and municipal procedural requirements. *See Med. Ctr. at Princeton v. The Tp. of Princeton Zoning Bd. of Adjustment*, 343 *N.J.Super.* 177, 213-214 (App.Div.2001) quoting *Riggs*, 109 *N.J.* at 611-612. The Court finds the testimony of defendant's expert, Ms. Gruel, credible and finds that Ordinance No. 64 advanced four (4) purposes of the Municipal Land Use Law identified above.

(4) *N.J.S.A.* 40:55D-62(a) only requires that the ordinance be either substantially consistent with the Master Plan or designed to effectuate such plan element. Cox, *New Jersey Zoning and Land Use Administration*, 34-2.2 (Gann 2006). "In defining 'substantial consistency' the Supreme Court in *Manalapan Realty v. Township Committee*, 140 *N.J.* 366, 384 (1995), made it clear that some inconsistency is permitted as long as it does not substantially or

materially undermine or distort the basic provisions and objectives of the Master Plan." *Id.* Furthermore, "where the Planning Board has determined that the Master Plan and proposed zoning ordinance are consistent, such a determination of consistency by the Board is entitled to 'deference and great weight'." *Id.* citing *Manalapan Realty*, 140 *N.J.* at 383. "This is particularly true where the Master Plan itself is not entirely clear and where the Governing Body is able to articulate reasonable planning considerations not entirely inconsistent with the Master Plan in enacting the ordinance." *Id. See, Witt v. Borough of Maywood*, 328 *N.J.Super.* 432, 445-448 (Law Div.1998), *aff'd o.b.* 328 *N.J.Super.* 343 (App.Div.2000). The Court finds that Ordinance No. 64 is, in fact, substantially consistent with the Master Plan and Reexamination Report of that Master Plan made in July 2002 including, but not limited to, the land use and plan elements.

(5) Defendant's expert, Mr. DeNiscia, criticizes Ordinance No. 64 because specific bulk restrictions set forth in Ordinance No. 64 are not spelled out in the Reexamination Report. Ms. Gruel testified, there was a sufficient identification of a need for new bulk and design standards to further regulate the physical appearance of the area in South Kearny identifying setbacks which permitted storage areas, container heights and screening signage. The Court finds that description in the Reexamination Report is substantially consistent with the ordinance to pass muster.

(6) The Court finds credible as a matter of fact that the balance, which Ordinance No. 64 speaks to between warehousing and distribution in the South Zone and the continuing truck facilities in the North Zone only, represents a valid zoning purpose.

(7) The Court does not find any inconsistency between a 25 foot wide strip buffer along the borders of outdoor storage of various uses under Ordinance No. 38-6.6[A](i) outdoor uses and the requirement for buffering the property lines for containers that are used as storage in the North District under 38-6.6[F] (m).

(8) The Court finds that Ordinance No. 64 comports with constitutional restraints on the zoning power including those pertaining to due process. Substantative due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that shock the conscience or otherwise offend the judicial notations of fairness and that are offensive to human dignity. *Rivkin v. Dover Tp. Rent Leveling Bd.*, 143 *N.J.* 352, 671 *A.2d.* 567 (1996). The Court finds there is no violation of due process or any other constitutional disabilities with Kearny's ordinance.

(9) The Court previously ruled in its May 4, 2006 decision that Ordinance No. 64 was adopted in accordance with statutory, municipal and procedural requirements.

(10) The Court does not find the boundary between the north and south subzones in South Kearny is

irregular and there is a rational basis for the zone boundary established under Ordinance No. 64 for the reasons enunciated by Ms. Gruel. Her identification of *most* of the trucking terminal facilities in the north zone has been proven to the Court's satisfaction (*See*, color-coded map, Exhibit D-24).

(11) The plaintiff offered two (2) fact witnesses—Mr. Moscatello, who owns a lot in the South Zone, and Mr. Kearny, who owns and sold various parcels of property in the South Kearny area, both north and south zones. Neither witness was presented as an expert in the field of valuation of property, but plaintiff's counsel attempted to elicit opinions on valuation from them based upon the impact of Ordinance No. 64 and their operations. First, both witnesses acknowledged that neither have been the subject of any prosecution for violation of Ordinance No. 64. Their opinions that their properties are rendered worthless is not accepted by the Court. Mr. Kearny has sold and bought property within the zone without producing any competent evidence to show substantial loss of value. *See*, *Neno v. Clinton*, 167 *N.J.* 573, 581 (2001).

(12) There is virtually no stacking of containers in the South Kearny area, and accordingly, a container stacking limit of two (2) is not unreasonable. In addition, the Court finds the rationale for providing for a landscaping of screening and buffering such storage facilities is a valid planning purpose. The terms and conditions of that screening and buffering set forth in Ordinance No. 64 are valid and reasonable.

(13) Plaintiff's attorney attempted, during the course of trial, to use Mr. Martello, Defendant's Construction Official, as their own witness to elucidate a possible conflict between the "maximum yard requirements" in Ordinance No. 64 in "front, side and rear yards" versus bulk requirements for improved lot coverage (90%) and coverage (40%). None of these issues regarding Ordinance No. 64 problem areas were identified during the pretrial of this matter, including the identification of issues set forth in plaintiff's expert's report. Accordingly, the Court has not ruled upon plaintiff's argument that there was a mistake in identifying in Ordinance No. 64, "maximum" yard requirement when in fact they should be "minimum" yard requirements and their argument that the change from "minimum yard requirements" to "maximum yard requirements" will result in a "substantial number of non-conforming uses". For the same reason the Court has not ruled upon plaintiff's last minute assertion during trial, that "compliance with Ordinance No. 64's maximum yard requirements and maximum bulk requirements is a practical impossibility." In any event, no competent proof on these issues was presented by the Plaintiff.

(14) Similarly, plaintiff's argument, in their post-trial submissions, that the authority given to the Construction Official under Section 36-9.2(c) in the Town of Kearny Land Use Code, which is not part of disputed Ordinance No. 64 gives impermissibly broad discretion to the Official is not addressed by the Court as (1) it was not an identified issue presented in this case for

disposition during pretrial, and (2) if there *was* an arbitrary application of Section 36-9.2, as it effects the implementation of Ordinance No. 64, a court action could be the subject of an independent and separate Court review.

(15) The balance of defendant's Ordinance No. 64 errata articulated by defendant's attorney in their post-trial submissions to the Court are without merit. Specifically, (1) claimed invalidity of Ms. Gruel's "drive by investigation" of the subject properties of South Kearny and (2) plaintiff's position that Ordinance No. 64 is invalid because the reference in Ordinance No. 64 to the preexisting subzone nomenclature of SKM-1 and SKM-2 under *another* ordinance was the subject of Court action in 2000 which invalidated *that* ordinance, presumably on technical grounds, which contained those designations. It is clear that Ordinance No. 64 created zones referred to as SKI-S and SKI-N and the Court finds those designations are valid and have withstood attacks initiated by plaintiff in this litigation resulting in the Court's decision of May 4, 2006 and this decision. *See*, *Marrotta v. Leone*, 172 *N.J.Super.* 62, (Law Div.1979).

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CONCLUSION

Based upon the foregoing, Judgment is entered in favor of defendant Town of Kearny against plaintiff on the remaining Counts 1, 4 and 5 of the Complaint and the Complaint is dismissed in its entirety without costs. As to Defendant Town of Kearny Planning Board, said defendant is not a party in interest per se on the remaining counts addressed in this decision and, therefore, the complaint is dismissed in its entirety as to Defendant Town of Kearny Planning Board. No cause of action has been proven against Defendant Albert Santos, in his official capacity as Mayor of the Town of Kearny and the Town Council of the Town of Kearny and, therefore, the complaint is dismissed in its entirety as to those defendants.

A copy of the Order for Judgment reflecting the dispositions is enclosed.

SO ORDERED.

HON. BARRY P. SARKISIAN, J.S.C.

APPENDIX C — OPINION OF THE SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, HUDSON COUNTY DATED AND FILED MAY 4, 2006

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION — HUDSON COUNTY
DOCKET NO. L-1-05

Civil Action

LINCOLN NORTH DEVELOPMENT CORPORATION

Plaintiff

v.

TOWN OF KEARNY, a municipal Corporation of the State of New Jersey, ALBERTO SANTOS, in his official Capacity as Mayor of the Town of Kearny, TOWN COUNCIL OF THE TOWN OF KEARNY, TOWN OF KEARNY PLANNING BOARD,

Defendants.

Date of Hearing: April 20, 2006

Date of Decision: May 4, 2006

Appendix C

OPINION

Summary of the Action

This is a prerogative writ action filed by plaintiff, Lincoln North Development Corporation—an association of South Kearny business members, which seeks to invalidate Kearny's municipal ordinance, Ordinance 64, which amended the current zoning regulations in southern end of Kearny.

Defendants Town of Kearny and Mayor and Town Council and Kearny Planning Board argue that the contested Ordinance was validly adopted.

South Kearny consists of 1.5 miles or 964 acres of total area. South Kearny is physically separated from the rest of Kearny and is located on a peninsula bordered on its east side by the Hackensack River and on its west side by the Passaic River. Both Rivers meet at South Kearny's southern tip forming Newark Bay. The northern section of South Kearny contains a large railhead and is bordered by the Hackensack Meadowlands. There are no residential areas located within South Kearny.

South Kearny has access to the major area highways including the New Jersey Turnpike, Routes 1 and 9, Route 78 and Route 280. The truck route of Routes 1 and 9 bisect South Kearny almost in the middle of the South Kearny peninsula.

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Before the enactment of Ordinance 64 by the governing body of Kearny on November 9, 2004, Kearny allowed truck terminals, motor freight terminals, railroad terminals and yards and yards and cartage and express facilities throughout all of South Kearny (the "SKM" Zone). After the adoption of Ordinance 64, after changing the nomenclature of the subzones—SKM-1 became SKI-N Zone ("N" designates the "North" subzone) and SKM-2 became SKI-S ("S" designates the "South" subzone), the ordinance added the following restrictions on permitted uses which is the focal point of plaintiff's attack on Ordinance 64.

> (a) The storage, parking or use of trucks, trailers, containers or any similar structure for storage purposes on a permanent basis is hereby prohibited in all districts enumerated in this zoning ordinance except SKI-N where it may be permitted subject to site plan approval.

The history of the operative zoning and planning studies and proposed legislation related to the restriction of truck terminal uses in the southern sector of South Kearny can be traced back to Kearny's 1991 Master Plan.

The 1991 Master Plan described the principal uses in the South Kearny area as consisting of "general warehousing, chemical storage/warehousing, heavy industrial uses and trucking terminals." Plaintiff's Exhibit C, at 8. The 1991 Master Plan concluded that

many of these uses are "poor tax ratable and employment sources", and were also a local eyesore. *Id* at 8. Trucking terminals, according to the Plan, were characterized by a dominance of open trailer truck parking and storage with minimal on-site improvements, constituting one of the most physically unattractive and least productive land uses within the South Kearny areas. *Id.* at 14.

This Master Plan found that truck terminals involving trailer truck parking and storage with minimal on-site improvements occupy 475 acres of land or 52% of the total South Kearny land area. It recognized trucking as the dominant land use in South Kearny, with over 75% of all properties in South Kearny dedicated to truck terminals were located north of Lincoln Highway. *Id.* at 14,16. South of Lincoln Highway, an area containing 40% of the total area of South Kearny, the Master Plan found that trucking "comprised a minority of land use in this area." *Id.* at 17. This Plan proposed to divide the area into two (2) subzones SKM-1 and SKM-2 with SKM-1 (the Northern Sector) allowing retail sales with the following additional uses: industrial *truck terminals*, warehousing, outdoor storage and public utilities. *Id.* at 9. SKM-2 (the Southern Sector) on the other hand would not permit truck terminals but only the following uses: industrial, manufacturing and warehousing. *Id.* at 11.

Notwithstanding this proposal, the Town of Kearny chose not to implement the recommended two (2) separate zoning regulations for SKM-1 and SKM-2.

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In 1998, the Town of Kearny re-zoned the South Kearny area based upon a revised Master Plan (see Exhibit F, Planning Board's Exhibits). This Master Plan continued the designation of SKM-1 and SKM-2 zones, but changed the dividing line of the zone by basically following the line of Pennsylvania Avenue, (see Exhibit G, Planning Board's Exhibits). The SKM-2, now by ordinance for the first time, prohibited trucking terminals. Although this Master Plan and zoning map was adopted by the Kearny Planning Board and the Town Council, its adoption was declared invalid by the Courts, according to counsel, due to a publishing technicality[1] and the Plan was never implemented. Therefore, the zoning designation and uses reverted back to the 1990 zoning map, Exhibit D and zoning ordinance, allowing truck terminal uses in both SKM-1 and SKM-2.

The next operative date in this history occurs in July 2002 when Kearny retained Heyer, Gruel & Associates, P.A. to prepare a Master Plan Reexamination Report. On May 7, 2003, the defendant Planning Board adopted the Master Plan Reexamination Report. Plaintiff's Exhibit A.

This report made numerous recommendations and changes to the 1991 Master Plan and to the zoning ordinances in South Kearny, but effectively *revisited* the restriction of trucking terminals in the Southern Section

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1. *APL v. Town of Kearny*, Docket No. HUD-L-2443-99, decided October 20, 2000 by Judge Gallipoli.

of South Kearny that had been addressed in 1991. The re-examination report indicated that the 1991 recommendations, although not implemented, had become *increasingly valid*, due to a number of factors, *Id.* at 9, including the development of the *Southern* section into a manufacturing center and the Northern Section into a transportation center. The Reexamination Report then proffered its justification for its proposal to sever South Kearny in half for zoning purposes:

> The core planning issue, therefore, revolves around establishing a balance between land uses to ensure that existing activities can continue to grow and develop. Central to this balance is ensuring that intermodal-oriented truck uses do not monopolize the peninsula's transportation network or land area. While the continued movement of trucks in distribution activities is important to South Kearny's economy, the long-term storage of trucks and trailers is not a productive use of limited land and results in visual blight. The visual blight resulting from unregulated container storage not only discourages revitalization of South Kearny, but also adversely affects the entire image of the Town.
>
> It is therefore recommended that South Kearny be rezoned into two separate districts SKI-N (South Kearny Industrial North) and SKI-S (South Kearny Industrial South), with

> the major distinction that truck terminals are not permitted within SKI-S.
>
> As indicated on the Proposed Land Use Map, the line between the two zones follows the prevailing land use pattern and recognizes the need for continued expansion of both manufacturing and intermodal activities.

Id. at 10 and 13.

The boundary line in the Proposed Landing Map ran North of Lincoln Highway along Gypsum Street and up (North) Jacobus Avenue. The Report recommended that in order for South Kearny to fully benefit from the plan in regional port and transportation improvements, this change would essentially establish a *balance* between warehouse/distribution and trucking facilities.

There are also, recommendations for changes to bulk and design standards in the Report. The Ordinance ultimately required that outdoor storage and tractor-trailer containers were permitted as a conditional use only in the SKM-1 end zone and containers were not to be stacked more than two (2) containers high if the conditional approval obtained. In addition, the Ordinance permitted conditional use landscape buffers at a minimum 25 foot buffer on the rear and side of the property lines. (See § 38-6.6, Ordinance Plaintiff's Exhibit B).

Appendix C

Plaintiff attacks Ordinance No. 64 on various constitutional and legal bases and asks the Court to enjoin Ordinance No. 64 from being enforced in its entirety. They also claim the Court should award damages for the enforcement or attempted enforcement of any or all of the provisions of Ordinance 64 for loss of business.

IS PLAINTIFF ENTITLED TO A PLENARY HEARING?

The Court has requested that the parties brief as to whether plaintiff is entitled to a plenary hearing on any of the counts for relief, in his complaint. Defendants argue, they are not. Defendant, Town of Kearny, also files for summary judgment pursuant to *R.* 4:46-1 dismissing the second through fifth counts of the complaint. There are nine counts in the complaint.

The Court chooses to first determine whether the plaintiff is entitled to a plenary hearing on *any* of issues which they raise in their complaint and articulate in their trial brief. The Appellate Division in the case of *Saratoga v. Borough of Harrison*, 346 *N.J.Super.* 569, 579 (App.Div.2002), *cert.den.* 172 *N.J.* 357 (2002), held that if a party challenging the validity of a zoning ordinance presents evidence that could support a finding that the ordinance violates the principals of sound zoning embodied in the MLUL, an evidentiary hearing must be held to give both the party challenging the ordinance and the municipality an opportunity to present expert testimony relevant to a determination of its validity.

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An action in lieu of prerogative writ challenging the *validity* of the ordinance is subject to different procedures than an action challenging a *quasi*-judicial action of a municipal agency. *Hirth v. City of Hoboken*, 237 *N.J.Super.* 149 (App.Div.2001). The Appellate Division elaborated on this distinction in the *Hirth* case which challenged a blight determination of a municipal board:

> If *quasi*-judicial action is challenged, the Court's decision must be based solely on the agency's records, which the Court reviews to determine whether the agency's factual findings are based on substantial evidence and whether discretionary decisions are arbitrary, capricious and unreasonable. In contrast, if the action is brought challenging the validity of an ordinance, a resolution of a challenge turns upon dispute of factual issues, and the case must proceed in the same manner as other civil litigation, with opportunity to discovery, pretrial motions at trial. *Id.* at 166.

See, Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 92 *N.J.* 158, 292, 456 *A.2d* 390 (1983), *Willoughby v. Planning Board of Deptford*, 306 *N.J.Super.* 266, 273-74 (App.Div.1997). *See, also Pressler, Current New Jersey Court Rules*, comment to *R.* 4:46-2 at 1785 (Gann 2005). *See, also Lyons v. Camden*, 48 *N.J.* 534 (1967).

Therefore, if a municipality seeks summary judgment dismissing a complaint challenging the validity of an ordinance, it has the same burden as any other civil litigant to show that "there is no genuine issue as to any material fact" and that it "is entitled to . . . judgment . . . as a matter of law." *R.* 4:46-2(c); *see Mitchell v. City of Somers Point*, 281 *N.J.Super.* 492, 500, 658 *A.2d* 1276 (App.Div.1994).

Generally, a zoning ordinance must satisfy certain objective criteria. First, the ordinance must advance one of the purposes of municipal land use law as set forth in *N.J.S.A.* 40:55D-2. Second, the ordinance must be substantially consistent with the land use plan element and the housing plan element of a master plan or design to effectuate such plan elements, *N.J.S.A.* 40:55D-62, unless the requirements of that statute are otherwise satisfied. Third, the ordinance must comport with constitutional constraints on the zoning power including those pertaining to due process, equal protection and the prohibition against confiscation. Fourth, the ordinance must be adopted in accordance with the statutory and municipal procedural requirements. *Riggs v. Township of Long Beach*, 109 *N.J.* 601, 611-12.

Plenary hearings challenging the validity of zoning ordinances are not new.

In the case of *Odabash v. Mayor and Council of the Borough of Dumont*, 65 *N.J.* 115 (1974), a zoning ordinance was implemented by the Borough of Dumont which attempted to restrict the development of garden

apartments. Plaintiff's home was located in the middle of several garden apartment and business properties, essentially an island in the middle of garden apartment complexes.

Plaintiffs filed an action in the Superior Court seeking reversal of the governing body's denial of a variance and a declaratory judgment that the zoning ordinance was unconstitutional.

The court found as to the Court's holding of a plenary hearing on zoning ordinance validity:

> Review of the local agency action on the variance is on the record made at the municipal level. The constitutional issue is determined either on the municipal record, if no further evidence is offered, or on such additional evidence, or both. *Id.* at 121 n. 4.

Both parties introduced expert testimony before the trial judge which was much more extensive than that presented before the Board of Adjustment.

In *Riggs v. Township of Long Beach*, 109 *N.J.* 601 (1988) the Court found that testimony may be taken in a situation in which a zoning ordinance is attacked as invalid for having no rational relation to a valid zoning purpose and for being unreasonable and arbitrary. *Riggs* involved a situation where the township was attempting to acquire property for public use. Plaintiff owned an unimproved lot which the township sought,

unsuccessfully, to acquire through negotiations with Riggs. After negotiations failed, the township re-zoned the subject property to be a low density space. The Court heard *testimony* from the Mayor of the town concerning the circumstances of the re-zoning and determined that the primary purpose for the re-zoning was to lower the market value of the subject property so as to reduce the cost for which the town would be required to purchase the property.

The Court found that the ordinance was not rationally related to a valid zoning purpose and that the ordinance was undeniably unreasonable and arbitrary.

In the case *Manalapan Realty LT v. Township of Manalapan*, 272 *N.J.Super.* 1 (App.Div.1994), the Appellate Division reversed the trial court below who concluded after a six-day bench trial that a zoning ordinance amendment which prohibited retail stores from selling lumber or building materials from a commercial shopping district was invalid. The Appellate Division found that a municipality has broad discretion in determining whether to create a certain use within its boundaries but did not suggest that the trial court should not have conducted a plenary hearing in the first instance. *See, Garland v. Borough of Maywood*, 45 *N.J.Super.* 1 at 6.7 citing *Manalapan* at page 9.

Thus, where an ordinance is being attacked as invalid or unconstitutional, it would appear that additional testimony can and probably should be taken by the Court unless the proffered factual attack does not pass summary judgment muster.

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Plaintiff's burden of proof is not insubstantial. As *Riggs* points out, there is a presumption of validity that attaches to the ordinance and a challenge may overcome the presumption only by showing that the ordinance is clearly arbitrary, capricious or unreasonable or plainly contrary to fundamental principles of zoning. *Riggs, supra* at 611. Moreover, unless the zoning ordinance infringes upon a fundamental right, there is no requirement that it recite "tangible, specific objectives permitted by the ordinance in order for the ordinance to be valid." *Zelinsky v. Zoning Board of Adjustment of Verona*, 105 *N.J.* 363, 371(521). The municipality may rely entirely upon planning objectives first identified during litigation defending the validity of the Ordinance and to sustain a constitutional attack, plaintiff must rule out any set of facts that reasonably supports the ordinance. *Zelinsky* at 371. The reason for this limited judicial role in reviewing the validity of a zoning ordinance was explained in *Kozesnik v. Township of Montgomery*, 24 *N.J.* 154, 167 (1957). The zoning statute delegates legislative power to local government. The judiciary, of course, cannot exercise that power directly or indirectly by measuring policy determination by a judge's private view. The wisdom of legislative action is reviewable only at the polls.

In this case, plaintiff does, in fact, have an expert, Roger DeNiscia, of Bertin Engineering Associates who, through his report, creates issues regarding Ordinance No. 64's validity and the principles governing the adoption of such an ordinance under the MLUL. Among other things, Mr. DeNiscia contends that the ordinance

which created the boundary line between the north and south zone in South Kearny creates an irregular zone; that it creates certain non-conforming motor freight uses, suggests that there was an improper omission of properties from the trucking zone which would preclude the expansion of motor freight uses which occur adjacent to those properties and effectively contends that the boundary line is arbitrary and capricious.

It then contends that the bulk changes and use conditions on container standards has a direct effect on the efficient land utilization and its stacking constitutes an undue restriction which reduces storage capacity by at least 67%. It also contends that a conditional use restriction limiting containment height is also unreasonable. Plaintiff's expert, Planner Susan Gruel, disagrees with these contentions in her report dated January 13, 2006.

Counts 1, 4, and 5

The first count contends that Ordinance 64 constitutes an arbitrary, capricious and unconstitutional attempt to regulate and/or restrict the use of land. Plaintiff asserts through their expert that the principles of sound zoning embodied in the municipality are violated by this ordinance. Plaintiff is entitled to a plenary hearing under the relatively tough standard enunciated above.

At a hearing before a governing body concerning the proposed adoption of a municipal ordinance, there

is no requirement that evidence be presented providing a factual foundation for the ordinance, and the governing body does not ordinarily make any findings of fact to justify its action.[2] *See Gardens v. City of Passaic*, 130 *N.J.Super.* 369, 377-78, 327 *A.2d* 250 (Law Div.1974), *aff'd o.b.*, 141 *N.J.Super.* 436, 358 *A.2d* 805 (App.Div. 1976).

To the extent that claims of arbitrary, capricious and unconstitutional attempts to regulate use of land and a factual dispute exists as the underpinnings of that claim including a due process argument contending that the particular regulation under attack do not bear a real and substantial relationship to a permissible legislative purpose, plaintiffs are entitled to a plenary hearing. *See generally, Taxpayer's Association of Weymouth v. Town of Weymouth*, 71 *N.J.* 249, 287-88 (1976); *J.V. Construction Corp. v. Board of Adjustment of Township of Freehold*, 119 *N.J.Super.* 140, 149-50 (Law Div.1972).

Similarly, zoning with its underpinning under the police power granted to municipalities must not go beyond not having unnecessary and excessive restrictions upon the use of private property. *Katobimar Realty Company v. Webster*, 20 *N.J.* 114 (1955).

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2. The Court's review of the transcripts submitted for the introduction and adoption of Ordinance 64 (Sept. 28; Oct. 12; Oct. 26 and Nov. 9, 2004) do not disclose any detailed findings of fact although there were isolated comments of the ordinance's salutary purposes by Mayor Santos in response to public comments (see E9, Nov. 9 Transcript 30:6).

Accordingly, plaintiff is entitled to a plenary hearing under Count One, Count Four (a due process claim) and Count Five (impermissible exercise of police power) which counts cannot be disposed of on the record below.

On the other hand, the Court finds that the balance of the complaint can be resolved on the record below, some of which are the subject of Defendant Kearny's Motion for Summary Judgment. We will take the remaining counts sequentially.

Count 2-Takings Clause

Plaintiffs claim that Ordinance 64 represents a taking of its property without just compensation since it limits plaintiff's operation of its facilities and trailers to the SKI-N Zone and restricts the use and amount of space available to it and therefore interferes with its right to expand in the future.

"[T]akings analysis makes two fundamental demands of any zoning scheme: it must substantially advance legitimate state interest, and it cannot deny an owner of all economically viable use of land." *Gardner v. New Jersey Pinelands Com'n*, 125 *N.J.* 193, 205 (1991). Once the first prong is met, "the critical remaining question is whether the regulations impair to an impermissible degree valuable property rights and interests. Diminution of land value does not itself constitute a taking. Impairment of marketability of land does not affect a taking. Restrictions on uses do not necessarily result in takings even though they reduce

income or profit." *Accord, Moroney v. Mayor and Council of the Borough of Old Tappan*, 268 *N.J.Super.* 458 (App.Div.1993), *cert. den.* 136 *N.J.* 295 (1994). "There exists no constitutional right to the most profitable use of property." *Gardner, supra* at 215.

Applying this test to the facts before the Court, the presumption of validity allows the Town of Kearny to argue that Ordinance 64 advances several legitimate state (municipal) interests. Ordinance 64 creates a balance between truck terminals and other essential revenue-generating components of an intermodal system that will accommodate planned improvements and anticipated growth of adjoining properties. Second, Ordinance 64 will increase the tax ratables of the municipality based on the anticipated changes in the area and the new zoning. Third, new jobs will be created. Lastly, Ordinance 64 restrictions on area, buffer and height will improve aesthetics and remedy the present blight in the area. Some of these positions will come under attack in the plenary hearing that the Court has ruled plaintiff is entitled.

However, even on a summary judgment standard, plaintiff's allegations do not and cannot support a finding that they cannot economically use the land. The majority of properties which operate truck, railroad and contained related uses are already located in SK1-N, and will continue to operate there. The remainder of the properties in the SKI-S zone that operate rail, freight and trailer and trucking activities can also continue their operations as a legal non-conforming pre-

existing use, thus they are not being deprived of the economic use of their property. *Gardner v. New Jersey Pinelands Com'n*, 125 *N.J.* 193, 212-213 (1991). The allegation that plaintiff will not be able to expand their operations in the future is likewise without merit in light of the fact that any property owner can apply for a variance if he wants to expand or use the property for a use that is prohibited by Ordinance 64. *Burbridge v. Governing Body of the Township of Mine Hill*, 117 *N.J.* 367 (1990).

Considering the presumption of validity, i.e., advancement of legitimate state interests and the continued economically viable use of plaintiff's properties, the second count of the complaint is found to be without merit as a matter of law, and is therefore dismissed.

Count 3(A)-Contracts Clause

Plaintiff's claim that Ordinance 64 violates the Contracts Clause of the Constitution in that it will impinge on their existing contractual obligations that depend on the continued operation and existence of their businesses.

Contracts Clause analysis consists of a three-prong analysis. The threshold question is whether the regulation has caused a substantial impairment of a contractual relationship and if so, whether the regulation serves a legitimate public purpose. If legitimate public purpose is found, the final inquiry is whether the

adjustment of the rights of contracting parties caused by the regulation is based on reasonable conditions and whether the adjustment is reasonably related to the government objective or interest. *In re Recycling & Salvage Corp.*, 246 *N.J.Super.* 79 (App.Div.1991).

As previously discussed, plaintiff will be able to continue their operations as legal non-conforming, pre-existing uses, *Gardner v. New Jersey Pinelands Com'n*, 125 *N.J.* 193, 212-213 (1991). Therefore, the ordinance will not interfere with plaintiff's ability to perform their contracts and plaintiff cannot pass through the threshold and this claim must fail.

Count two of plaintiff's complaint is dismissed.

Count 3(B)-Commerce Clause

Plaintiff's contend that Ordinance 64 violates the Federal Commerce Clause because their business affects inter/intrastate commerce, and that the ordinance would disrupt this flow.

Plaintiff analogizes this case to the case of *Pittston Warehouse Corp. v. City of Rochester*, 528 *F.Supp.* 653 (W.D.N.Y.1981) wherein the Federal District Court invalidated an ordinance by the City of Rochester, New York, that effectively banned commercial shipping at the Port of Rochester.

Defendant counters that Ordinance 64 does not prohibit trucks and other freight carriers from entering

or leaving the state and that trucks and freight carriers can maintain their usual operations. Plaintiff can continue their present business operations and, therefore, the flow of interstate and intrastate commerce will not be adversely affected.

The first question a court must ask in performing a commerce clause analysis is whether the regulation at issue discriminates against interstate commerce. *Old Coach Dev. Corp. v. Tanzman*, 881 F.2d 1227, 1231 (3d Cir.1989). "[D]iscrimination against interstate commerce entails imposing a burden on out-of-state vehicles or favoring those from in-state without a comparable favor for those from out-of-state." *American Trucking Associations, Inc. v. Larson*, 683 *F.2d* 787, 799 (3d Cir.1982).

When a state or municipal statute or regulation discriminates on its face or operates to favor in-state economic interests over out-of-state interests, a heavy burden is imposed on the defender of the legislation to "demonstrate both that the statute 'serves a legitimate local purpose,' and that this purpose could not be served as well by available nondiscriminatory means." *Old Coach*, 881 *F.2d* at 1231-32. (quoting *Maine v. Taylor*, 477 *U.S.* 131, 138 (1986); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 *U.S.* 573, 579 (1986). Thus, a regulation faces a heightened scrutiny standard if it is driven by a discriminatory purpose or if it has a discriminatory effect. *Brown-Forman*, 476 U.S. at 579; *Old Coach*, 881 *F.2d* at 1231, *Norfolk S. Corp. v. Oberly*, 822 *F.2d* 388, 398-401 (3d Cir.1987).

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When a state or municipal regulation is not discriminatory, or its effect on interstate commerce is incidental, the Court will evaluate it pursuant to a balancing test and the regulation will be upheld unless the burdens on interstate commerce are clearly excessive in relation to the putative local benefits. See *Pike v. Bruce Church, Inc.*, 397 *U.S.* 137 (1970); *Old Coach*, 881 *F.2d* at 1231.

In the exercise of its police power, a municipality may enact an ordinance which "restricts personal freedom and property rights, and sometimes imposes burdens upon, or affects, interstate commerce. In the latter connection, where the burden is only incidental *and the restriction warranted by local needs*, it is generally held that such local legislation is valid." *Cunard S.S. Co. v. Lucci*, 92 *N.J.Super.* 148, 155 (Ch. Div.1966).

Here, the ordinance at issue does not have a discriminatory impact. A discriminatory impact would be found where the ordinance at issue discriminates between in-state and out-of-state interests which this ordinance does not. This is a zoning ordinance, the underlying rationale and purposes addressed in the 2002 Re-examination Report, allows trucking terminals to operate in a certain section of South Kearny and other new trucking terminals not to operate south of the particular boundary line within a certain region.

In the case of *Pittston Warehouse Corp. v. City of Rochester*, 528 *F.Supp.* 653 (W.D.N.Y.1981), relied upon

by plaintiff, the court invalidated three City of Rochester laws which effectively prohibited commercial shipping at the City's port as well as prohibiting commercial cargo and shipping terminals and warehouse and distribution centers. Therefore, the laws placed a significant burden on interstate commerce which the court declared to be outright economic isolationism and patent economic protectionism.

Such is not the case here. The ordinance at issue does not impose a substantial (if any) burden on interstate commerce and plaintiff has failed to provide any evidence which indicates the ordinance will impose any burden on interstate commerce. The ordinance limits trucking to areas where trucking is generally occurring and allows existing trucking companies to continue operation. To fall within the *Pittston* standard, Ordinance 64 would have to prohibit all trucking in South Kearny which is not the case.

As Ordinance 64 does not have a discriminatory impact, places only an incidental (if any) burden on interstate commerce and is warranted by local needs, the ordinance would be valid under the commerce clause.

Accordingly, Count 3 of plaintiff's complaint, with respect to the Interstate Commerce argument is dismissed.[3]

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3. At oral argument, plaintiff brought to the Court's attention the report of their transportation expert, Arthur L. Max of Weintraub, Casey, Zercow and Max dated November 24,

(Cont'd)

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Count 4 As to Equal Protection

Plaintiff's claim that Ordinance 64 violates the Equal Protection Clause of the Constitution.

Generally, equal protection claimants must be part of a protected group, usually based on race or gender, and must be singled out on that basis. "Ordinarily an equal protection plaintiff must be singled out because

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2005, submitted as a miscellaneous document, not specifically identified and certainly not articulated or presented in plaintiff's brief. Mr. Max's resume indicates that he has a law degree and "specialized in interstate commerce and business law" in the firm from 1969 to 1971. He served a year as vice-president of his company that dealt with "all aspects of truck terminal real estate, including site selection, engineering, planning, zoning, financing the disposition of facilities". After identifying the zoning ordinance amendment, which is the subject of this litigation, opines based upon "knowledge of the terminal real estate market and trucking industry *in general* that the zoning amendment, under review and its prohibition against truck terminals in South Kearny would "adversely affect and impair both the flow and growth of interstate commerce in the northeast region". The report then makes general conclusions describing the area as a "unique transportation asset in the entire region." He talks, in very general terms, about the growth of intermodal freight handling. The Court has ruled, as a matter of law, that no Commerce Clause issue is presented. The Court further finds that the conclusions of Mr. Max are unsupported by factual evidence or other data and effectively is a net opinion. *In the Matter of Yaccarino*, 117 *N.J.* 175, 196 (1989), *Buckelew v. Grossbard*, 87 *N.J.* 512, 524 (1981).

of membership in a class and cannot be just the victim of a random act of governmental incompetence. Furthermore, the state's act of singling out an individual for differential treatment does not itself create the class [as that] would make . . . every act of government a violation of the Constitution. Therefore, successful equal protection claimants usually demonstrate purposeful discrimination based on membership in a protected class, such as race." *Rivkin v. Dover Township Rent Leveling Board*, 143 *N.J.* 352 (1996), *cert. den.* 519 *U.S.* 911 (1996).

In applying the standard to the facts at bar, plaintiff's equal protection argument falls far short of a meritorious claim. The trucking industry is not part of a protected class nor does it affect a fundamental right. Therefore, equal protection claims are evaluated under a rational basis scrutiny. "[T]he "rational basis" test is to be used in the analysis of [a] due process claim because the ordinance does not affect a fundamental right . . . and does not discriminate against a suspect class." *Salem Blue Collar Workers Ass'n v. City of Salem*, 33 *F.3d.* 265 (3rd Cir.1994). As previously discussed, Ordinance 64 is rationally related to important government interests of aesthetics, creating jobs, accommodating planned improvements and anticipated growth of adjoining properties, and increasing the tax ratables of the municipality. Furthermore, the Court cannot substitute its judgment for the legislature "in areas of practical administration which may justify, even require, rough accommodations that to some extent result in dissimilarity of treatment." *General Food*

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Vending Inc. v. Town of Westfield, 288 *N.J.Super.* 442 (Law Div.1995).

Rational relationship on its face exists between the ordinance and important state objectives. Plaintiff cannot show any dissimilarity of treatment between themselves and other businesses.

Furthermore, there is no invidious discrimination where the Town of Kearny clearly adopt an ordinance which provides for the continued operation of a trucking business in that area of South Kearny where *most* of the trucking businesses were operating.

Therefore, Count 4 of the complaint is dismissed with respect to plaintiff's equal protection claim.[4]

Count 7

Plaintiff makes a claim under Count 7 that Ordinance 64 is invalid because it is "inconsistent with the Town of Kearny Master Plan and fails to satisfy the requirements of the Municipal Land Use Law, *N.J.S.A.* 40:55D-1, *et seq.*

The courts have developed four criteria for determining the validity of an ordinance. To be valid, an ordinance must: (a) advance at least one of the

4. The Court makes no ruling on *Count 6* as it is not a cause of action but rather a claim for relief by way of injunction based on immediate irreparable damage. If plaintiff prevails at the plenary hearing, they would be entitled to injunctive relief.

purposes of the MLUL (b) be substantially consistent with the land use and housing plan element of the master plan or designated to effectuate such plan elements; (c) comport with constitutional constraints on the zoning power, including those pertaining to due process; and (d) be adopted in accordance with statutory and municipal procedural requirements. *Riggs v. Township of Long Beach*, 109 *N.J.* 601, 611-612 (1988).

As identified in defendant, Town of Kearny's brief, (Pb pp. 9-10) it would appear the zoning ordinance advances at least four of the Municipal Land Use purposes.

> a. To encourage municipal action to guide the appropriate use or development of all lands in this State, in a manner which will promote the public health, safety, morals, and general welfare;
>
> g. To provide sufficient space in appropriate locations for a variety of agricultural, residential, recreational, commercial and industrial uses and open space, both public and private, according to their respective environmental requirements in order to meet the needs of all New Jersey citizens;
>
> i. To promote a desirable visual environment through creative development techniques and good civic design and arrangement;

> m. To encourage coordination of the various public and private procedures and activities shaping land development with a view of lessening the cost of such development and to the more efficient use of land;

Further, Ordinance 64 would appear to be consistent with the land use element of Kearny's Master Plan. Although the boundary line drawn in the 1991 Master Plan Report, and the Reexamination Report of July 2002 and Ordinance No. 64 did vary, the objective of both was to divide the South Kearny peninsula into a northern and southern zone, and allowing trucking only in the northern. Finally, the Ordinance enacted is substantially consistent with the zoning map.

N.J.S.A. 40:55D-62(a) is the operative section of the MLUL which deals with adoption of a zoning ordinance. It provides that:

> The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon. Such ordinance shall be adopted after the planning board has adopted the land use plan element and the housing plan element of a master plan, and all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such

plan elements; provided that the governing body may adopt a zoning ordinance or amendment or revision thereto which in whole or part is inconsistent with or not designed to effectuate the land use plan element and the housing plan element, but only by affirmative vote of a majority of the full authorized membership of the governing body, with the reasons of the governing body for so acting set forth in a resolution and recorded in its minutes when adopting such a zoning ordinance; and provided further that, notwithstanding anything aforesaid, the governing body may adopt an interim zoning ordinance pursuant to subsection b. of section 77 of P.L.1975, c. 291 (C.40:55D-90).

The zoning ordinance shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land. The regulations in the zoning ordinance shall be uniform throughout each district for each class or kind of buildings or other structure or uses of land, including planned unit development, planned unit residential development and residential cluster, but the regulations in one district may differ from those in other districts.

As the Supreme Court stated, the concept of "substantially consistent" permits some inconsistency,

provided it does not substantially or materially undermine or distort the basic provisions and objectives of the Master Plan." *Manalapan Realty v.. Township Committee*, 140 *N.J.* 366 (1995).

In this case, the Reexamination plan was amended to reflect one property change during the ordinance approval process—two (2) pieces of property that were jointly owned and operated were straddling the proposed boundary line. The properties were owned by Motor Carrier Corp. ("CSX"). Upon CSX's request and the planner's recommendation, the planning board approved an amendment moving the dividing line south to include the two tracts together. *See*, Defendant Planning Board's Exhibit L, pp 11-14 and Exhibit O, 12:18-14:14. *See, also*, map dated October 2004, Plaintiff Exhibit B.

Plaintiff relies on the case of *Willoughby v. Planning Board of Twp. Of Depford*, 326 *N.J.Super.* 158 (App.Div.1999). However, that case is distinguishable. In *Willoughby*, the inconsistent change which was invalidated was inconsistent with the Master Plan's stated goal to protect a certain area from development.

In this case, defendant adopted an ordinance that was substantially similar to its Master Plan as amended and re-examined in 2002. Accordingly, plaintiff's seventh count is dismissed.

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Count 8

The eighth count of the complaint can also be resolved on the record below. Plaintiff contends that Ordinance 64 is invalid because defendants Planning Board and/or Town Council failed to provide the proper notice in connection with adoption and/or amendment of Ordinance 64. Plaintiff contends Ordinance 64 was marred by a series of "irreparable procedural flaws" (Pb 18) and expands on their "Notice" issues in their March 28, 2006 supplemental brief. Plaintiff argues deficiencies[5] in the public notices as to (1) Planning Board action relative to the Re-Examination Report hearings in June/July 2002, (2) Planning Board hearings relative to the adoption of Ordinance No. 64, (3) deficiencies in procedures and publications by the governing body in adoption of Ordinance 64, and (4) the discrepancy between the zoning map and the boundaries set forth in Ordinance 64.

Planning Board Hearings of June/July 2002

The Town Council of Kearny, as part of its statutory obligation requiring periodic re-examination of its Master Plan,[6] examined its current master plan to

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5. The Court notes that in the plaintiff's supplemental brief dated March 28, 2006 on procedural deficiencies, there are several factual inaccuracies as to dates of ordinance adoption by the governing body and dates of Planning Board or governing body meetings.

6. *N.J.S.A.* 40:55D-89.

determine if any changes were deemed necessary. The "2002 Master Plan Reexamination Report" was reviewed by the Kearny Planning Board and adopted by the Town Council, see transcripts of June 5, 2002 (Planning Board, Exhibit P) and transcripts of July 31, 2002 (Planning Board, Exhibit O). The Town Council adopted the report on May 7, 2003. Members of the public were heard on June 5, 2002 and the transcript references notice to the public (Exhibit P, 50:9). Beyond that, (1) plaintiff's raising of this issue is time barred per Rule 4:69-4 as the Re-Examination Report was adopted on May 7, 2003 and plaintiff's complaint was filed 1-1/2 years later on December 29, 1004, and (2) plaintiff had representation in the Planning Board meetings in which the reexamination report was considered and had the opportunity to voice its concerns at that time. *See e.g.* Transcript of Master Plan Reexamination Hearing, July 31, 2002, pp. 23-35.

The Balance of Plaintiff's Alleged Procedural Deficiencies of Ordinance 64

As to the adoption of Ordinance 64, the Court finds that the recitation of the procedural and publication events enumerated in detail by the Planning Board's attorney, Mr. Gillespie, in his brief at pp. 13-14, to be accurate and comports with the record below, which the Court has reviewed, more specifically:

> The Code of the Town of Kearny listed the Improved Lot Coverage of the SKM-S zone at 90%. The first drafting of Ordinance 2004-

(O)-64 changed the Improved Lot Coverage to 60%. The Ordinance was re-drafted, after the October 12, 2004 reading, which placed the Improved Lot Coverage back to 90%. The (Amended) Ordinance, Exhibit I, was then "first read" on October 26, 2004, See Exhibit J, page 22 and then was published on November 1, 2004, See Exhibit K. This Ordinance was forwarded to the Planning Board and reviewed by the Planning Board on November 3, 2004, Exhibit L, and prepared a Report, Exhibit C, in accordance with statute, and forwarded the same to the Town Council with two recommendations: First, the Board recommended that the definition of the term "Break Bulk" need not be contained in the Ordinance as the term "Break Bulk" does not appear anywhere in the proposed ordinance. Second, the Board requested a better definition of the term: "TEU." Amended language was inserted into the Ordinance upon the second reading. The "Container" definition of the Ordinance as presented to the Planning Board read as follows: Standard measuring unit—TEU twenty foot equivalent unit. The ordinance as passed defined "Container" as follows: Standard measuring unit *for a container is a* TEU (twenty foot Equivalent Unit). The second reading was held on November 9, 2004, as amended ("Break Bulk" was eliminated and the definition of TEU embellished). The

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Ordinance, Exhibit B, passed at the second reading, see Exhibit M, and was [thereafter] published on November 16, 2006, see Exhibit N. Neither of these changes can remotely be held to be substantial. The amount of Improved Lot Coverage amendment was a change that was implemented prior to the "first reading," of the Ordinance, was contained therein when the Ordinance was presented to the Planning Board for Report and when the second reading of the ordinance took place.

As to CSC "southerly" property (Lot 18 in Block 289) being included in the SKM-N zone, at the time of the presentation of the Master Plan to the Planning Board, in the presence of the Town planner and with the agreement of the Town Planner, the Planning Board determined that it was in the best interest of the Master Plan and the Zoning Ordinance to include the CSX property (Lot 18 in Block 289 within the SKM-N Zone. The rational of this determination was that the lot shared common use and a common ownership with the other CSX owned SKM-N property. Upon agreement, the Town passed the Master Plan with the agreement (on the record) that the ordinance/map would be amended to reflect the agreed to change. Up until this time, that change has not been made but will be made in the future. There is no debate that the

change is forthcoming nor have there been any proceedings against CSX regarding its use of the premises, see Transcripts, 11/3/04 pages 1-14, Exhibit L; Transcripts 7/31/02 page 12, line 18 to page 14, Exhibit O confirming this change.

N.J.S.A. 40:49-2[7] governs the procedure for adoption of a municipal ordinance requiring (1) an introduction

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7. *N.J.S.A.* 40:49-2 provides in relevant parts as follows:

Except as otherwise provided in R.S.40:49-6 and 40:49-12, the procedure for the passage of ordinances shall be as follows:

a. Every ordinance after being introduced and having passed a first reading, which first reading may be by title, shall be published in its entirety or by title or by title and summary at least once in a newspaper published and circulated in the municipality, if there be one, and if not, in a newspaper printed in the county and circulating in the municipality, together with a notice of the introduction thereof, the time and place when and where it will be further considered for final passage, a clear and concise statement prepared by the clerk of the governing body setting forth the purpose of the ordinance, and the time and place when and where a copy of the ordinance can be obtained without cost by any member of the general public who wants a copy of the ordinance. If there be only one such publication the same shall be at least one week prior to the time fixed for further consideration for final passage. If there be more than one publication, the first shall be at least one week prior to the time fixed for further consideration for final passage.

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b. At the time and place so stated in such publication, or at any time and place to which the meeting for the further consideration of the ordinance shall from time to time be adjourned, all persons interested shall be given an opportunity to be heard concerning the ordinance. The opportunity to be heard shall include the right to ask pertinent questions concerning the ordinance by any resident of the municipality or any other person affected by the ordinance. Final passage thereof shall be at least 10 days after the first reading.

c. Upon the opening of the hearing, the ordinance shall be given a second reading, which reading may be by title, and thereafter, it may be passed with or without amendments, or rejected. Prior to the said second reading, a copy of the ordinance shall be posted on the bulletin board or other place upon which public notices are customarily posted in the principal municipal building of the municipality, and copies of the ordinance shall be made available to members of the general public of the municipality who shall request such copies. If any amendment be adopted, substantially altering the substance of the ordinance, the ordinance as so amended shall not be finally adopted until at least one week thereafter, and the ordinance as amended shall be read at a meeting of the governing body, which reading may be by title, and shall be published in its entirety or by title or by title and summary, together with a notice of the introduction, the time and place when and where a copy of the amended ordinance can be obtained without any cost by any member of the general public who desires a copy, a clear and concise statement prepared by the clerk of the governing body setting

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and first reading by title, (2) a publication, (3) a second reading with a public hearing, and (4) adoption. The Court in the case of *Great Atlantic and Pacific Tea Company v. Borough of Point Pleasant*, 137 *N.J.* 136, 142 (1944) explain how this process is expanded upon with Planning Board review when we are dealing with the introduction of a zoning ordinance or zoning ordinance amendment.

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> forth the purpose of the ordinance, and the time and place when and where the amended ordinance will be further considered for final passage, at least two days prior to the time so fixed. At the time and place so fixed, or at any other meeting to which the further consideration of the amended ordinance may be adjourned, the governing body may proceed to pass the ordinance, as amended, or again amend it in the same manner.
>
> d. Upon passage, every ordinance, or the title, or the title and a summary, together with a notice of the date of passage or approval, or both, shall be published at least once in a newspaper circulating in the municipality, if there be one, and if not, in a newspaper printed in the county and circulating in the municipality. No other notice or procedure with respect to the introduction or passage of any ordinance shall be required.
>
> Nothing herein shall be construed to affect the provisions of R.S.40:49-7 to 40:49-12 or R.S.40:49-27.

For the purposes of this section, "governing body" shall include any municipal or county agency, board or commission authorized by law to adopt ordinances.

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> When adopting a zoning ordinance, the governing body introduces the ordinance on first reading, *N.J.S.A.* 40:49-2(a); publishes a notice of a public hearing, *N.J.S.A.* 40:49-2(b); submits the ordinance to the planning board for review, *N.J.S.A.* 40:55D-26(a) and 40:55D-64; and considers the ordinance for adoption after a second reading, *N.J.S.A.* 40:49-2(c).

The Court finds that Ordinance 64 was properly adopted and plaintiff's contention of procedural deficiencies is rejected. There was a first reading, publication, a second reading with a public hearing, adoption and publication.

Further, the Ordinance enacted is substantially consistent with the zoning map. *N.J.S.A.* 40:55D-62(a) provides that:

> The governing body may adopt or amend a zoning ordinance relating to the nature and extent of the uses of land and of buildings and structures thereon. Such ordinance shall be adopted after the planning board has adopted the land use plan element and the housing plan element of a master plan, and all of the provisions of such zoning ordinance or any amendment or revision thereto shall either be substantially consistent with the land use plan element and the housing plan element of the master plan or designed to effectuate such plan elements; provided that the governing

body may adopt a zoning ordinance or amendment or revision thereto which in whole or part is inconsistent with or not designed to effectuate the land use plan element and the housing plan element, but only by affirmative vote of a majority of the full authorized membership of the governing body, with the reasons of the governing body for so acting set forth in a resolution and recorded in its minutes when adopting such a zoning ordinance; and provided further that, notwithstanding anything aforesaid, the governing body may adopt an interim zoning ordinance pursuant to subsection b. of section 77 of P.L.1975, c. 291 (C.40:55D-90).

The zoning ordinance shall be drawn with reasonable consideration to the character of each district and its peculiar suitability for particular uses and to encourage the most appropriate use of land. The regulations in the zoning ordinance shall be uniform throughout each district for each class or kind of buildings or other structure or uses of land, including planned unit development, planned unit residential development and residential cluster, but the regulations in one district may differ from those in other districts.

As the Supreme Court stated, 'the concept of' substantially consistent" permits some inconsistency, provided it does not substantially or materially

undermine or distort the basic provisions and objectives of the Master Plan." *Manalapan Realty v.. Township Committee*, 140 *N.J.* 366 (1995).

In this case, the Re-Examination plan was amended to reflect one property change. Two pieces of property that were jointly owned and operated were straddling the proposed boundary line. The properties were owned by Motor Carrier Corp. ("CSX"). Upon CSX's request and the planner's recommendation, the planning board approved an amendment moving the dividing line south to include the two tracts together.

Plaintiff relies on the case of *Willoughby v. Planning Board of Twp. Of Depford*, 326 *N.J.Super.* 158 (App.Div.1999). However, that case is distinguishable. In *Willoughby*, the change which was invalidated was inconsistent with the Master Plan's stated goal to protect a certain area from development.

In this case, defendant adopted an ordinance that was substantially similar to its Master Plan as amended and re-examined.

The procedural requirements for the adoption of Ordinance 64 were satisfied and as the zoning map was substantially consistent with the Ordinance.

The eighth count of plaintiff's complaint is dismissed.

Appendix C

Count 9

For the reasons indicated above, the Court does not find that there is any inconsistency between the boundary line between SKM-N and SKM-S and the Master Plan and, more importantly, the Re-Examination Report adopted by the governing body on May 7, 2003. Accordingly, there has been compliance with the requirements of 40:55D-62 which requires that the ordinance be "substantially consistent with the land use plan and housing plan element and the Master Plan that is designed to effectuate such plan elements." The Court finds that the ordinance was substantially consistent with the Master Plan as amended by the Re-Examination Report of 2002. Accordingly, Count 9 is dismissed.

PREEMPTION ARGUMENTS RAISED IN PLAINTIFF'S BRIEF BASED UPON (1) THE HAZARDOUS MATERIALS TRANSPORTATION ACT (HMTA) AND (2) INTERSTATE COMMERCE COMMISSION TERMINATION ACT (ICCTA) BUT NOT PLED IN THE COMPLAINT ARE WITHOUT MERIT AND ACCORDINGLY ARE DISMISSED

Plaintiff argues in its brief (Pb.21) that Ordinance No. 64 cannot stand on grounds of federal pre-emption under the Hazardous Materials Transportation Act (HMTA) 49 *U.S.C.* 1801 *et. seq.* First, this claim was *never* pled in the Complaint. Notwithstanding that, the Court has reviewed the HMTA and concludes this local zoning ordinance would not be invalidated under that federal law. Kearny's zoning ordinance does not prevent the

South Kearny entities from complying with the requirements of the act and does not present an obstacle to complying with the act. Further, the zoning ordinance does not deal with any of the specific types of activities reserved under section (b) of the preemption section.

To prevail in a preemption action, plaintiffs must show as a matter of law "either that federal regulations and statutes either occupy or preempt the entire field and prohibit municipalities from regulating in this area, or that compliance with both federal and state law is impossible. Conversely, for defendant to prevail, it must prove that the field is not entirely preempted and that its regulation is a permissible exercise of its police powers." *Consolidated Rail Corporation v. The City of Bayonne*, 724 *F.Supp.* 320, 323 (3d Dist.1989) where the Court indicates:

> When a state's exercise of its police power to promote the health, safety or welfare of its citizens is challenged under the Supremacy Clause, the court must 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress'.

Id.

> [A] state or local law is 'inconsistent' with federal requirements under the HMTA when

> it is not possible to comply with both, or where state requirements are an obstacle to an execution of federal law.

Jersey Central Power & Light Co. v. Lacey Township, 772 *F.2d* 1103, 1113 (3d Cir.1985).

In this case, the ordinance at issue is not in conflict with the explicit preemption provisions contained in the HMTA. Further, the zoning of specific areas for truck uses is not an area extensively regulated by the HMTA and plaintiff has not pointed to any evidence to indicate that the zoning ordinance in question would have the impact of impeding compliance with the provisions of the HMTA.

For all these reasons, the Court finds that Ordinance 64 is not invalidated by the HMTA.

Plaintiff also alleges, in its brief (Pb 22), that any and all limitations that Ordinance 64 would purport to impose upon CSX, as a member of Lincoln North, are effectively preempted under the Interstate Commerce Commission Termination Act ("ICCTA"), which again was not pled in the complaint. More specifically, without submitting any supporting certification, plaintiff *infers* in its brief that because one of its members, "CSX", operates a railroad, to the extent that Ordinance 64 regulates an activity (trucking) related to railroad transportation, it is preempted.

Appendix C

Congress originally enacted the Interstate Commerce Act ("ICA") in 1887 to establish a statutory scheme for regulating the nation's railroads. As part of this regulatory scheme, the ICA established the Interstate Commerce Commission ("ICC"), a federal agency charged with regulation of railroad transportation.

In 1995, in an effort to deregulate, in substantial part, the railroads and other modes of surface transportation, Congress enacted the ICCTA and abolished the ICC. Congress also replaced the ICC with the newly established Surface Transportation Board ("the STB") and granted the STB exclusive jurisdiction over rail function and proceedings. See 49 U.S.C. 701. Congress appears to have intended for the ICCTA, 49 U.S.C. 10501, to preempt expressly all local regulations governing rail transportation. See *CSX Transp., Inc. v. Georgia Pub. Serv. Comm'n.*, 944 *F.Supp.* 1573, 1581 (N.D. Ga.1996), citing *Medtronic v. Lohr*, 518 *U.S.* 470, 494 (1996).

The statutory language of the ICCTA indicates an express intent of Congress to preempt the entire field of railroad regulation, including activities relating to but not directly involving railroad transportation such as trucking. See 49 U.S.C. § 10102(6)(A), (C) and *Grafton and Upton Railroad Comp. v. Town of Milford*, 337 *F.Supp.*2d 233, 238 (D.Mass.2004). The ICCTA defines "transportation" as including the movement of locomotives and railcars in addition to "services related to that movement, including . . . interchange of passengers and property." 49 U.S.C. § 10102(6)(A).

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Several courts have held that the regulation of non-railroad activities are expressly preempted under the ICCTA so long as those activities are related to the operation of railroads for use in interstate commerce. See *City of Auburn v. United States Gov't*, 154 *F.3d* 1025, 1031 (9th Cir.1998) (environmental regulation); *Wisconsin Central Ltd. v. City of Marshfield*, 160 *F.Supp.2d* 1009, 1014 (W.D.Wis.2000) (public safety).

However, although cases interpreting the preemptive scope of the ICCTA are rare, the First Circuit Court of Appeals has held that in order to be permissible under the ICCTA, state and local regulations applied to the development of an automobile unloading facility must not interfere with interstate rail operations. *Boston and Maine Corp. v. Town of Ayer*, 330 *F.3d* 12, 16 (1st Cir.2003). In Boston and Maine Corp., the court endorsed the decision of the STB to limit local environmental regulation to that which does not unduly burden interstate commerce or unduly restrict the railroad from conducting its operations. *Id.* at 16.

In the case of *Grafton and Upton Railroad Comp. v. Town of Milford*, 337 *F.Supp.2d* 233, 238 (D.Mass. 2004) the District Court held that zoning ordinances which would impair the ability of a railroad to develop its yard to allow for the shipment of steel and the subsequent distribution of steel by truck were likely preempted by the ICCTA. However, the court left it to the STB to determine, in the first instance, the precise scope of that preemption (the Town had earlier filed a petition with the STB seeking a declaratory order that

the proposed use of the rail yard was prohibited by the Town's zoning ordinance).

There are several reasons why the Court finds there is no merit to this preemption argument.

First, as noted by defendant, Town of Kearny Planning Board, the ordinance in question has no effect on CSX. The property owned by CSX is totally within the SKM-N district which allows trucking and truck terminals. Lot 18, owned by CSX was included in the SKM-N zone after first being excluded from that zone. Town of Kearny Planning Board Trial Brief, p. 20.

Second, there has not been one scintilla of proof submitted in certified form that would present a material issue of fact that "CSX's" railroad operations would be impaired by Ordinance No. 64. Thus, Ordinance 64 does not interfere with any trucking uses of CSX and does not interfere with CSX's rail operations.

For these reasons, the Court finds that Ordinance 64 is not preempted by the ICCTA.

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CONCLUSION

This Court will conduct a case management conference for the plenary hearing outlined above for May 24, 2006 at 3:00 p.m. Parties are to submit pretrial memoranda to the Court per Rule 4:25-3 at least five (5) days in advance of the case management conference. A copy of the Court's order reflecting the above dispositions is enclosed.

SO ORDERED.

s/ Barry P. Sarkisian
Barry P. Sarkisian, J.S.C.

APPENDIX D — ORDER OF THE SUPREME COURT OF NEW JERSEY DATED MAY 15, 2008 AND FILED MAY 16, 2008

SUPREME COURT OF NEW JERSEY
C-970 September Term 2007
62,554

LINCOLN NORTH DEVELOPMENT CORPORATION,

Plaintiff-Petitioner,

v.

TOWN OF KEARNY, et al.,

Defendants-Respondents.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1960-06 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 15th day of May, 2008.

s/ Stephanie Townsend
CLERK OF THE SUPREME COURT

APPENDIX E — RELEVANT ORDINANCE

TOWN OF KEARNY
COUNTY OF HUDSON
2004 - (D) - 64

ORDINANCE AMENDING CHAPTER 38 "ZONING" OF THE REVISED GENERAL ORDINANCES TO EFFECT RECOMMENDATIONS IN THE MASTER PLAN REEXAMINATION REPORT

* * *

ORDAINED by the Mayor and Council of the Town of Kearny, Hudson County, New Jersey that:

* * *

(d)

Sec. 38-4.5 of the Revised General Ordinances is revised and amended as follows:

(1) The first sentence of paragraph "a" is rescinded, revoked and deleted.

(2) What had been the first sentence of paragraph "a" is replaced with the following:

a. The storage, parking or use of trucks, tractors, trailers containers or any similar structure for storage purposes on a permanent basis is hereby prohibited in all districts

enumerated in this zoning ordinance except SKI-N where it may be permitted subject to site-plan approval.

(e)

Chapter 38 be and hereby is amended and supplemented by the addition of Section 38-4.6 which shall read as follows:

38-4.6 Storage of Containers.

a. The outdoor storage of containers shall be permitted as a conditional use only in the SKI-N Zone.

b. Containers shall not be permitted to be stacked more than two (2) containers high, if conditional use approval shall be sought and granted pursuant to paragraph a.

(f)

The chart entitled "Schedule I — Schedule of District Use Regulations" is amended and revised as follows:

(1) The caption "SKM-1. South Kearny Manufacturing Zone" be and hereby is rescinded, revoked and deleted.

(2) The said caption, shall now read "SKI-N. South Kearny Industrial North."

Appendix E

(3) Number 3 "Cartage and express facilities," under the column "Permitted Principal Use" shall be deleted in its entirety.

(4) Number 4 under the column "Permitted Principal Use" shall be amended to read "Motor Freight Facilities, Freight Forwarding Facilities, Intermodal Facilities, Truck Terminals and Warehouse and Distribution Facilities.

(5) Number 9 under the column "Permitted Principal Use" shall be amended to include reference to subsection 38-6.6M.

(6) The balance of the section, encaptioned "Permitted Principal Use," "Permitted Accessory Use" and "Conditional Use" and the verbiage under each column shall remain unchanged, except as amended in paragraphs (3), (4) and (5) above.

(g)

The chart entitled "Schedule I — Schedule of District Use Regulations" is further amended and revised as follows:

(1) The caption, "SKM-2. South Kearny Manufacturing Zone" be and hereby is rescinded, revoked and deleted.

Appendix E

(2) The said caption, shall now read "SKI-S. South Kearny Industrial-South."

(3) The balance of the section, encaptioned "Permitted Principal Use," "Permitted Accessory Use" and "Conditional Use" and the verbiage under each column shall remain unchanged, but added to it shall be the provision that "all operations, activities and storage shall be conducted within completely enclosed buildings."

(4) Number 1 under the column "Permitted Principal Use" shall also be amended as follows:

(a) to read "Any SKI-N Zone Permitted Principal Use" instead of "Any SKM-1 Zone Permitted Principal Use" and to

(b) delete "cartage facilities," "motor freight terminals and yards" and replace those terms with "Motor Freight Facilities," "Freight Forwarding Facilities," "Intermodal Facilities," and "Trailers,"

* * *

Appendix E

(i)

Section 38-6.3 *Accessory Uses in Nonresidential Zone*, shall be amended and supplemented with the following:

k. All operations, activities and storage (except off street parking and loading, accessory lumberyards and home improvement centers), shall be conducted within completely enclosed buildings.

* * *

(j)

Chapter 38 is amended and supplemented by the addition of the following Section:

38-6.6 "Conditional Uses" is amended and supplemented by the addition of the following:

[A.] i. *Outdoor Uses* — All operations, activities and storage shall be conducted within completely enclosed buildings in both the SKI-N and SKI-S zones, except that the outdoor storage of containers, off street parking and loading, accessory lumber yards and home improvement centers may be permitted in the SKI-N Zone only and only if they shall comply with the following requirements:

Appendix E

1. There shall be a 25-foot wide strip of landscaped open space, with heavy vegetative screening along its borders;

* * *

[F.] n. *Containers.* Container storage is only permitted within the SKI-N District and subject to the following conditions:

1. Containers shall not be stacked more than two (2) containers high.

2. There shall be a minimum 25-foot wide landscaped buffer along the rear and side property lines. Buffer shall contain a combination of deciduous and evergreen trees and shrubs and berming necessary to visually screen the proposed use upon installation. At installation, plant material shall be sized a minimum of:

i. Deciduous trees 3" caliper.

ii. Evergreen trees 6' in height, B&B

iii. Deciduous and evergreen shrubbery 5-gallon container or 36" B&B

iv. Preference shall be given to native species.

v. No plant prohibited within the NJMC shall be permitted.

3. Wetland plantings shall conform to most recent adopted Landscape and Open Space Guidelines established by the New Jersey Meadowlands Commission.

* * * *

105

(2)

Supreme Court, U.S.
FILED
SEP 15 2008
OFFICE OF THE CLERK

No. 08-197

IN THE

Supreme Court of the United States

LINCOLN NORTH DEVELOPMENT CORPORATION,

Petitioner,

v.

TOWN OF KEARNY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

BRIEF IN OPPOSITION FOR RESPONDENTS TOWN OF KEARNY, MAYOR AND TOWN COUNCIL

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108 N.J. Super 65 (App. Div. 1969) 12

STATEMENT OF MATTER INVOLVED

Petitioner's application is rife with misstatements of fact[1] and premised on an inaccurate interpretation of Ordinance 64. Ordinance 64 does not affect the flow of interstate commerce, violate the Interstate Commerce Commission Termination Act nor does it interfere with federal mail. Simply stated, Ordinance 64 which has been in effect for nearly four years advances the municipal land use goals established by the Town's Master and Reexamination plans in promoting the most efficient use of the land while maintaining the established predominate uses. Petitioner has not and cannot maintain the dramatically inaccurate, unsubstantiated allegations or the prospective speculative harm alleged.

ORDINANCE 64

On November 9, 2004, the Town of Kearny ("the Town" or "Kearny") adopted Ordinance 2004-(0)-64 ("Ordinance 64") pursuant to the 2002 Reexamination Report of the Kearny 1991 Master Plan. This ordinance amended Chapter 38 of the Revised General Ordinances of the Town of Kearny by re-designating the SKM-1 and SKM-2 zones in South Kearny as SKI-N (South Kearny Industrial North) and SKI-S (South Kearny Industrial South) respectively. The major difference between the two new zones was that the storage, parking or use of

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[1] Petitioner has never established any of the facts alleged in reference to CSX. Petitioner proffered a half dozen fact witnesses for trial and presented the testimony of two, neither a representative of CSX. The record below is devoid of any evidence of the facts now asserted by Petitioner.

trucks, tractors, trailers and containers or any similar structure for storage purposes on a permanent basis was prohibited in all districts except SKI-N. Additionally, Ordinance 64 established new area, yard and bulk requirements, as well as providing new conditions for the storage of containers.

The Kearny Planning Board adopted Ordinance 64 after careful examination of the present zoning in the Town, the anticipated changes to the Town and its surrounding area, and the expected benefits to the Town if the zoning was implemented. As part of its review, the Town requested a Master Plan reexamination report, which was prepared in July 2002 ("2002 Report"). The 2002 Report was based upon consideration of the 1991 Master Plan Revision ("1991 Report").

1991 Report: The 1991 Report suggested the restructuring of South Kearny into two areas, SKM-1 and SKM-2. In recognizing that the uses in South Kearny included trucking terminals, general warehousing, chemical storage/warehousing and heavy industrial uses, the 1991 Report stated that "many of these uses were poor tax ratables and employment resources as well as unattractive and deleterious to the surrounding physical and visual environment."

With respect to trucking terminals, (*75% of which were located to the north of Lincoln Highway*), the 1991 Report stated that these were characterized by a "dominance of open trailer truck parking and storage with minimal on-site improvements" which were one of the most "physically unattractive and least productive land uses within the South Kearny area." The land south

of Lincoln Highway (40% of the total area in South Kearny) was used primarily for warehousing and distribution. Trucking terminals constituted a minority of the land use in this area.

In dividing South Kearny into two areas, the 1991 Report suggested that the SKM-1 (SKI-N) district should allow industrial, truck terminals, warehousing, outdoor storage and public utilities, as well as chemical processing facilities and the P.S.E. & G. fossil fuel power plant, while the SKM-2 (SKI-S) area should include industrial, manufacturing and warehousing. This division would meet the objectives of encouraging the transition away from the predominant trucking-oriented uses into light industrial and manufacturing activities, promoting redevelopment in South Kearny and maximizing as built tax ratables.

2002 Report: While the 2002 Report indicated generally that several of the objectives in the 1991 Report were no longer valid, it specifically referred to the recommendations in the earlier report as they relate to South Kearny as being "*increasingly valid.*" This conclusion is based on several factors, including "the prevailing land use pattern, recent redevelopment efforts and anticipated regional port improvements."

The 2002 Report recognized that South Kearny is located in a unique area since its southern border is the headwaters of Newark Bay, and the CSX and Norfolk Southern rail depots are located to the north. However,

there are several anticipated changes to the area. As stated in the 2002 Report:

> A number of significant projects are currently being developed, which will increase the scope and nature of economic activity in South Kearny. These events are centered upon the expansion of the regional port system to capitalize upon NAFTA and other recent free trade agreements. The most important projects include the dredging of Newark Bay to accommodate large-draft container ships, the construction of the truck-dedicated Portway system to move containers between the ports and surrounding intermodal facilities and the dissolution of Conrail into privately held CSX and Norfolk Southern. The Port Authority of New York and New Jersey anticipates that these changes will contribute to a doubling of port traffic by 2010 and a ten-fold increase by 2040.

The 2002 Report *predicted that the expansion of international trade would generate a local demand for industrial related activities, such as manufacturing, value added manufacturing and warehousing.* The report also predicted that the increase in the port traffic would create increased intermodal activity.

As stated in the 2002 Report:

> International trade will generate a local demand for industrial related activities, including manufacturing, value added

> manufacturing and warehousing. Increased port traffic will also create intermodal activity, as more and more containers are shipped in combination of rail and trucks. The core planning issue therefore revolves around establishing a balance between uses to ensure that existing activities can continue to grow and develop. Central to this balance is ensuring that intermodal oriented truck uses do not monopolize the peninsula's transportation network or land area. While the continued movement of trucks in distribution-activities is important to South Kearny's economy, the long-term storage of trucks and trailers is not a productive use of limited land and results in visual blight. The visual blight resulting from unregulated container storage not only discourages revitalization of South Kearny, but also adversely affects the entire image of the Town.

The proposed boundary was thereafter drawn so as to best accommodate the operating businesses with the need for expansion of industrial and manufacturing activities.

The majority of industrial operations are presently located predominately south of Lincoln Highway in the SKI-S area, and all of the present trucking operations and trucking terminals are located in the area designated SKI-N. The testimony of the Town's planning expert and the maps evidenced that the trucking operations are located predominantly in the

area north of Gypsum Street, east of Jacobus Avenue, south of Pennsylvania Avenue and west of the Hackensack River.

The boundary line differs slightly from the recommendation in the 1991 Report in order to take into account changing policy, the trend toward warehousing, and the goal of the 2002 Report. More importantly, the Town based the dividing line on a complete and thorough review of the area as proffered by Ms. Gruel and Mr. Martello the Town's sub-code official.

The whole of South Kearny is fully developed with truck terminals and freight forwarding facilities in the North and warehousing and distribution in the South. Intermodal and freight forwarding facilities ("trucking") is a primary use in the North and a permitted conditional or accessory use in the South. Additionally long term outside storage of merchandise is neither permitted nor necessary in the North, as trucking terminals by nature do not require storage beyond the loading and unloading of merchandise, which is permitted by Ordinance 64.

Kearny Municipal Ordinance 64 was enacted pursuant to, and in conformity with, Municipal Land Use Law.

Respectfully, review by this Court would be contrary to law. Despite petitioner's desire to create a critical issue of first impression, none exists. The record clearly and unequivocally establishes that Ordinance 64 does not interfere with interstate commerce; violate the commerce clause, conflict with either ICCTA or with the

federal postal distribution center. To the contrary, the facts as established in a three-day plenary hearing are contrary to petitioner's contentions, which are unsupported in fact and law.

REASONS FOR DENYING THE PETITION

I. KEARNY MUNICIPAL ORDINANCE 64 DOES NOT AFFECT INTERSTATE COMMERCE AND THUS DOES NOT VIOLATE THE COMMERCE CLAUSE.

Petitioner alleges that Ordinance 64 violates the Commerce Clause. Petitioner claims that their trucking businesses affect intrastate and interstate commerce, and that by curtailing or eliminating trucking related uses, the Town is impairing the flow of interstate commerce.

This allegation is unsupported by the record and was found to be without merit by both the Trial and Appellate Courts. Ordinance 64 does not prohibit trucks and other freight carriers from entering or leaving the state. The operations in both the SKI-N and the SKI-S continue unfettered. The vast majority of South Kearny is fully developed and the existing operations continue in both the North and South.

Petitioner's reliance on *Pittstown Warehouse Corp. v. City of Rochester*, 528 F. Supp. 653 (W.D.N.Y. 1981), is misplaced. In that case, the court found that the municipal ordinance directly blocked the free flow of interstate and international commerce by prohibiting the port in Rochester from commercial cargo and shipping terminals and warehouse and distribution

centers resulting in the prohibition of *all* commercial interstate and international shipping activities. The ordinance in the case at bar is not prohibitive and does not impair the flow of commerce; it merely allocates certain areas on the land for specific types of businesses so that the land will be used profitably. The ordinance was enacted in 2004 and has not affected the flow of port traffic. The record is devoid of facts that support petitioner's contentions to the contrary. Petitioner's contention that trucking is not allowed in the South is incorrect. The predominate use of the South Zone is warehousing and distribution, however, intermodal use must be, and is, a permitted conditional and accessory use to warehousing and distribution. The "trucking prohibition" is merely the disallowance of truck and trailer yards which is nothing more than the long term parking of trucks and trailers for profit which is not the predominate use in the South Zone.

Even if petitioner could prove that interstate commerce would be slightly affected, New Jersey courts have recognized that:

> In the exercise of its police power, a municipality may enact an ordinance, which does restrict personal freedom and property rights and sometimes imposes burdens upon or affects interstate commerce. In the latter connection where the burden is incidental and the restriction warranted by local needs, it is generally held that such local legislation is valid. *Cunard S.S. Co. v. Lucci*, 92 N.J.Super. 148, 155, 222 A.2d 522 (Ch.Div.1966), aff'd 94

N.J.Super. 440, 228 A.2d 719 (App.Div.1967); *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970).

The vast majority of the trucking operations are already located in the SKI-N zone; Ordinance 64 has no impact on them. The vast majority of the SKI-S zone is warehousing and distribution wherein trucking operations continue as a conditional and accessory use. Neither the SKI-N nor the SKI-S areas are impaired or impeded by Ordinance 64. In addition, the Ordinance has several significant purposes that greatly outweigh any minor inconvenience to the appellant.

Petitioner's contention that the report of its purported expert, Arthur L. Max, went unchallenged is erroneous. The Town challenged the report and the trial court held that Mr. Max's report was a net opinion.

At oral argument, petitioner brought to the Court's attention the report of their transportation expert, Authur L. Max of Weintraub, Casey and Zercow and Max dated November 24, 2005, submitted as a miscellaneous document, not specifically identified and certainly not articulated or presented in petitioner's brief. The Court ruled, as a matter of law that no Commerce Clause issue was presented. The Court further finds that the conclusions of Mr. Max are unsupported by factual evidence or other data and effectively is a net opinion.

The trial court properly held:

> The ordinance at issue does not impose a substantial burden (if any) burden on interstate commerce and plaintiff has failed to provide any evidence which indicates the ordinance will impose any burden on interstate commerce. The ordinance limits trucking to areas where trucking is generally occurring and allows existing trucking companies to continue operation. As Ordinance 64 does not have a discriminatory impact, places only an incidental (if any) burden on interstate commerce and is warranted by local needs, the ordinance would be valid under the Commerce Clause.

In sum, Ordinance 64 does not violate the Commerce Clause, as it has no impact on interstate commerce.

II. Ordinance 64 Has No Affect on the Hazardous Materials Transportation Act and Interstate Commerce Commission Termination Act.

Petitioner failed to plead the preemption of Ordinance 64 by either the Hazardous Materials Transportation Act (HMTA) or the Interstate Commerce Commission Termination Act (ICCTA). Petitioner raised both these issues in response to respondent's motion for summary judgment and the trial court properly held that neither Act was applicable nor was Ordinance 64 preempted by either Act.

In reference to the HMTA, the trial court held:

> The ordinance at issue is not in conflict with the explicit preemption provisions contained in the HMTA. Further, the zoning of specific areas for truck uses is not an area extensively regulated by the HMTA and plaintiff has not pointed to any evidence to indicate that the zoning ordinance in question would have the impact of impeding compliance with the provisions of the HMTA.

Similarly, in reference to the ICCTA, the trial Court held:

> There are several reasons why the Court finds there is no merit to this preemption argument. First, as noted by defendant, Town of Kearny Planning Board, the ordinance in question has no effect on CSX. The property owned by CSX is totally within the SKI-N district, which allows trucking and trucking terminals. Lot 18, owned by CSX was included in the SKI-N zone after fist being excluded from that zone. Town of Kearny Planning Board Trial Brief, p.20. Second, there has not been one *scintilla of proof submitted in certified form that would present a material issue of fact that "CSX's" railroad operations would be impaired by Ordinance No. 64.* Thus, Ordinance 64 does not interfere with any trucking uses of CSX and does not interfere with CSX's rail operations. (Emphasis added)

In sum, Ordinance 64 has no affect on the Hazardous Materials Transportation Act or the Interstate Commerce Commission Termination Act.

III. Ordinance 64 Has No Effect on the United States Post Office in South Kearny

Petitioner, for the first time in this action, claims that Ordinance 64 has a "criminal" effect on the United States Post Office located in South Kearny. The argument is both improperly raised and erroneous.

First, petitioner has no standing to raise the argument. The United States government is not party to this action nor has the government intervened in this action.

Second, the South Kearny Post Office is a warehouse and distribution center located in the SKI-N zone. The postal facility is a distribution center not a trucking facility; and because of its location in the SKI-N zone the Post Office may have trucking as its primary, accessory or conditional use. The suggestion that Ordinance 64 raises the possibility of a disruption of service at the U.S. postal facility, potential incarceration of the Town's employees etcetera is nothing short of absurd.

Lastly, and most importantly, the law is well settled that the Post Office is immune from local municipal ordinances. *Thanet Corporation v. Township of Princeton*, 108 N.J. Super 65 (App. Div. 1969) Petitioner's allegations of interference with the distribution of federal mail is inaccurate.

IV. Both the Zones Established by Ordinance 64 are in compliance with the predominate uses in South Kearny.

The north-south dividing line created by Ordinance 64 is in compliance with the preexisting uses in South Kearny. During the plenary hearing, the Town clearly established that the predominate use in the North section was intermodal while the southern section was predominately warehousing and distribution. The dividing line was drawn precisely to follow the predominate uses. As evidenced in the record, Town planner, Susan Gruel and the Kearny sub code official, Michael Martello, clearly established that there was no wholesale nonconformity.

The Trial Court correctly held:

> The Court does not find the boundary between the north and south sub zones in South Kearny is irregular and there is a rational basis for the zone boundary established under Ordinance No. 64 for the reasons enunciated by Ms. Gruel. Her identification of most of the trucking terminal facilities in the north zone has been proven to the Court's satisfaction.

Appellate review affirmed the Trial Court's findings. The record is devoid of evidence that suggests that Ordinance 64 renders either of the dominant uses in the SKI-N or the SKI-S non-conforming.

CONCLUSION

Petitioner's arguments are hollow as unsupported in fact and law. None of the dramatic contentions asserted are supported by the record below. Petitioner has inexplicably asked this Court to review nonexistent issues for which this Court could not grant relief. For all the foregoing reasons the respondent respectfully requests appellant's petition for certiorari be denied.

Respectfully submitted,

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